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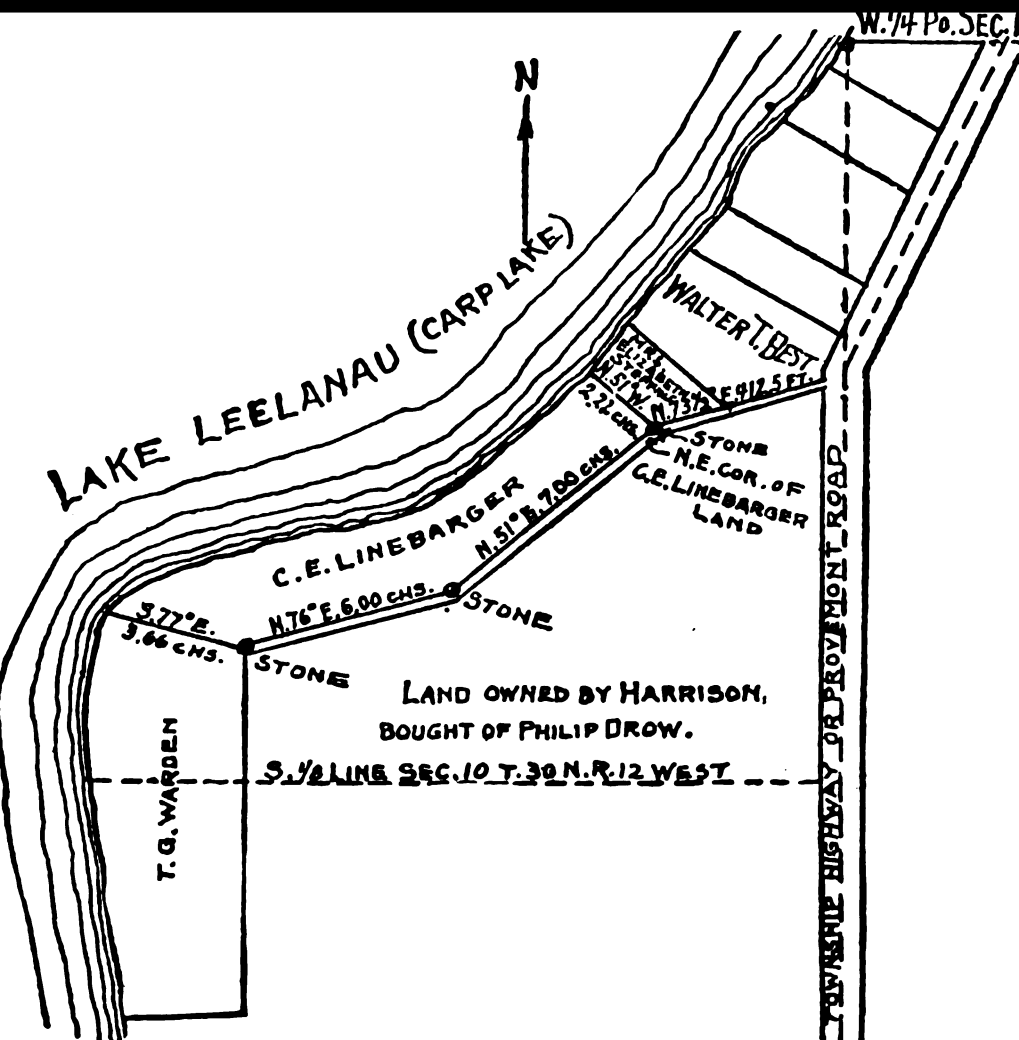
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Michigan Reports

Michigan Supreme Court, Harry Burns Hutchins, Van Buren Denslow, John L. Stoddard, Edward Gott, ...



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MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

JULY 24 TO OCTOBER 3, 1914

JAMES M. REASONER
STATE REPORTER

VOL. 182
FIRST EDITION

CHICAGO
CALLAGHAN AND COMPANY
1915

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JUNE TERM, 1914.*

WARDEN v. LINEBARGER.

EASEMENTS—DEEDS—EQUITY—INJUNCTION.

Under a warranty deed conveying to the complainant a parcel of land and "a right of way one rod wide commencing," etc., describing the way and providing that complainant and defendant should have joint rights in the use thereof, complainant did not acquire a title in fee simple, but an easement in the way, and the court properly refused a decree restraining defendant from tearing down a fence which complainant had erected along the parcel granted to him for easement purposes.

Appeal from Leelanau; Mayne, J. Submitted June 16, 1914. (Docket No. 73.) Decided July 24, 1914.

Bill by Theodore G. Warden against Charles E. Linebarger for an injunction. From a decree for defendant, complainant appeals. Affirmed.

Underwood & Umlor, for complainant.

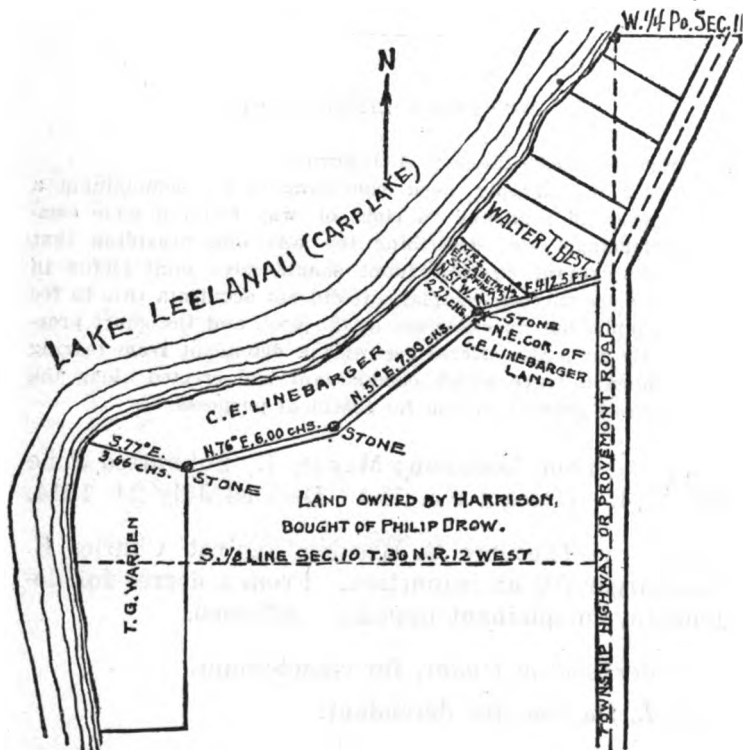
C. L. Dayton, for defendant.

MOORE, J. The attached plat will aid in understanding the case.

Mr. Linebarger bought his 2½ acres with a right of way of Philip Drow and wife, in August, 1901, and put a hotel on the land. The complainant was given by Mr. Drow and wife a warranty deed to his 7½ acres in August, 1907, and in the same deed is the following language:

*Continued from Vol. 181.

"Also a right of way one rod wide commencing at the northeast corner of the land above conveyed and running thence in a northeasterly direction along the south side of lands heretofore conveyed to C. E. Linebarger to the northeast corner of said Linebarger



land; thence N. $73\frac{1}{2}$ degrees E. to the township highway, 412.5 feet more or less; the line above given being the northerly line of said one rod in width, and it is hereby understood that the right of way running northeasterly from Linebarger land to township highway is to be used jointly by the said Theodore G. Warden, C. E. Linebarger and Walter T. Best, their heirs and assigns."

After obtaining his deed complainant put up a fine house upon the land, and now claims the right to

fence in the one-rod strip. This claim is denied by defendant, who has torn down some of the fences, and insists upon the right to tear them down. Out of this dispute grew the filing of this bill of complaint asking for an injunction, and that the rights of the parties be defined, on July 3, 1911. From a decree dismissing the bill of complaint the case is brought here by appeal.

There are certain additional facts to those already stated that appear so clearly in the decree, that we quote from it as follows:

"And it further appearing to the court that the complainant contends that through said deed he acquired a title in fee simple to a part of said right of way, and it further appearing to the court that the said deed should not be so construed, but that it conveyed an easement of right of way;

"And it further appearing that fences are not needed by the said complainant along the said right of way in order to fully enjoy its use;

"And it further appearing to the court that the said Philip Drow and wife undertook to convey the lands over which said right of way runs to said complainant by quitclaim deed, dated August 11, 1911, and recorded in the office of register of deeds of Leelanau county, Mich., on August 12, 1911, in Liber 37 of Deeds on page 350;

"And it further appearing to the court that the said deed was given and delivered after the commencement of this cause, and is not mentioned in any of the pleadings therein, and that prior to the giving and delivery of this last-mentioned deed the said Philip Drow and wife had executed to one Harry P. Harrison a warranty deed of certain lands, including the lands over which said right of way runs, and that said deed had been deposited in escrow at the time said quitclaim deed of August 11, 1911, was given and delivered, and that about the time said deed was deposited in escrow said Harry P. Harrison took possession of the lands conveyed by said warranty deed with the consent of said Philip Drow and wife, and that the said Harry P. Harrison, prior to the commencement of this ac-

tion, had entered into a contract to convey part of said lands, including the lands over which the said right of way runs, to said defendant, and that prior to the commencement of this suit the said defendant had taken possession of said last-mentioned lands, and was in actual and lawful possession of the same at the time this suit was commenced, and that at the time the said quitclaim deed, dated August 11, 1911, was given by Philip Drow and wife to Theodore G. Warden the said complainant had full knowledge of the terms of the said warranty deed given by said Philip Drow and wife to Harry P. Harrison, and at that time deposited in escrow;

"And it further appearing that since that time the said warranty deed deposited in escrow has been delivered to the said Harry P. Harrison and been recorded in the office of the register of deeds, and the said Harry P. Harrison has executed and delivered to the defendant a warranty deed of the lands that said Harry P. Harrison had contracted to convey to the defendant, including the lands over which said right of way runs;

"And it further appearing to the court that the said deed of August 11, 1911, is of no force as against said defendant as far as this cause is concerned, for the reason that it was given after this cause was commenced, and is not mentioned in any of the pleadings; and it further appearing that said quitclaim deed of August 11, 1911, is of no force or effect as against the said defendant, for the reason that the defendant was in actual and lawful possession of the lands said Harry P. Harrison contracted to sell and convey said defendant prior to the giving of said quitclaim deed and prior to the commencement of this suit, and for the reason that said complainant was fully advised of the terms of said warranty deed given by said Philip Drow and wife to said Harry P. Harrison, prior to and at the time the said quitclaim deed of August 11, 1911, was executed and delivered."

The complainant contends here, as he did in the court below, that he has such a title to the one rod wide right of way that he has the right to fence it in. The language of his conveyance is not ambiguous. We

think it gives him but an easement over well-defined grounds. See 39 Cyc. p. 1767; *Moffitt v. Lytle*, 165 Pa. 173 (30 Atl. 922); *Sizer v. Quinlan*, 82 Wis. 390 (52 N. W. 590, 16 L. R. A. 512, 33 Am. St. Rep. 55).

The case does not call for an extended discussion. The decree is affirmed, with costs.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OS-
TRANDER, BIRD, and STEERE, JJ., concurred.

PASTORINO *v.* CITY OF DETROIT.

1. MUNICIPAL CORPORATIONS—STREETS—ADVERSE POSSESSION—PRESCRIPTION.

Act No. 46, Pub. Acts 1907 (5 How. Stat. [2d Ed.] §§ 14133, 14134), enacting that rights by prescription might not be thereafter obtained in public streets, changed the pre-existing rule in Michigan and brought the law into conformity with the general rule recognized by the weight of authority.

2. SAME—FRUIT-STAND—DEFINITION.

The word "fruit-stand" signifies a place where fruit is sold at retail—a place where the business is conducted, the pursuit being closely related to hawking: the business of one who sells or offers goods for sale on the public street, by outcry or by exposing the wares, or by placards, labels, signals, etc.

3. SAME—NUISANCE—CITIES.

A fruit-stand maintained in a street of the city of Detroit without permission and in violation of a municipal ordinance prohibiting persons from obstructing or incumbering streets and other public places with buildings, boxes and like objects, was an encroachment and constituted a public nuisance.

4. SAME—PRESCRIPTION—ADVERSE USER.

While adverse title may be acquired through possession held by a tenant, the party claiming prescriptive title must show a disseisin and unequivocal assertion of title in himself as against the original holder of the title; and as bearing upon the adjacent owner's claim of right to part of a public street in support of his title, it is important to ascertain whether any notice was ever given to the municipality of the alleged claim.

5. NUISANCE—STREETS—PRESCRIPTION.

A fruit-stand upon a public highway is not in its nature such a permanent obstruction that rights of prescription can be based upon its maintenance.

6. SAME—MUNICIPAL CORPORATIONS—POLICE POWER.

Such a structure on the sidewalk is a nuisance which may be abated after proper notice, and the objectionable object may be summarily removed from the street.

Appeal from Wayne; Hally, J. Submitted June 17, 1914. (Docket No. 90.) Decided July 24, 1914.

Bill by Celestino Pastorino against the city of Detroit and others for an injunction and other relief. From an order sustaining a demurrer to the bill of complaint, complainant appeals. Affirmed.

Joseph T. Schiappacasse, for complainant.

Richard I. Lawson, Corporation Counsel, and *W. E. Tarsney*, Assistant Corporation Counsel, for defendants.

STEERE, J. This case involves the question of title by adverse possession claimed to have been obtained through encroachment upon a public street of the city of Detroit.

Complainant, claiming a title in his landlord by prescription and a resulting right in himself as lessee to the peaceable possession, enjoyment, and use of a location occupied by him as a fruit-stand beyond the street line of a certain corner lot in the business dis-

trict of said city, filed his bill of complaint in the circuit court of Wayne county in chancery, asking an injunction to restrain the municipal authorities from forcibly ejecting and removing him and his fruit-stand from said premises, as was threatened. From an order sustaining a demurrer to and dismissing said bill of complaint, he brings the case here for review.

Briefly stated, the bill of complaint alleges, in proper form and apt language, that complainant leases a place for and owns a fruit-stand on the north-west corner of Jefferson avenue and Randolph street in said city, on the front of and adjoining lot 12 of section 1 of the Governor and Judges' plan of the city of Detroit; that said fruit-stand is located upon the sidewalk in front of said lot occupying a width of two feet and four inches and a length of about eight feet from the corner on each street adjacent to the lot line; that the premises which said fruit-stand covers in said street in front of said lot have been occupied as a fruit-stand, under a lease from the owners of said lot, continuously since March 27, 1890, by successive fruit venders, each successor buying said stand from a previous owner and attorning during his occupancy as tenant to the owner of the lot; that complainant himself first purchased the fruit-stand from a prior owner, and became a tenant on April 29, 1900, and was in possession until September, 1908, when he sold the same to one John Pastorino, who was in possession until May 12, 1913, when complainant bought him out and has since continued in the occupation of said premises, paying the owner of the adjacent lot rent therefor until the time of filing this bill. Continuous occupation, use, lease, and payment of rent for the statutory period are positively stated, and it is averred that:

"Through your orator and the other prior owners or lessees of the said stand, by reason of continuous payments of rent to the owners or lessees of said lot

the owners of said lot were in actual, visible, open, and notorious, distinct, exclusive, and continuous, hostile and adverse possession of said premises occupied by the said stand."

Said bill recites certain action by the city council looking to abating encroachments on streets, and requiring that notice be given to all parties occupying and obstructing the streets and sidewalks with shoe-shining stands, vending stands, booths, etc., to vacate within 30 days from service of notice, directing the commissioner of public works and chief of police of said city to forcibly remove and eject all those not complying with said notice, and to remove all obstructions from said streets; that said officials have served the directed notice on John Pastorino, complainant's assignor, and have informed complainant of their intent to obey said orders and eject him accordingly, and are threatening so to do. Without going into further details, the bill sets forth at length the necessary facts and circumstances to fairly raise the issue of title by prescription here presented.

Defendants' demurrer specifies six reasons therefor, in substance that complainant has made out no title or right to relief, and has but a permissive use of the space occupied by him as a fruit-stand, title to which cannot be acquired by such permission; that the bill shows the premises occupied by the fruit-stand are in a public highway, the right of possession being claimed under a lease by an occupancy—

"Not adverse as against the owner of the adjoining property, and therefore complainant cannot acquire title to said premises by virtue of his lease; that complainant is not a proper party to file a bill of complaint, having acquired no interest in the subject-matter by virtue of his lease, and adverse possession cannot be obtained by the occupancy of a portion of a public highway with temporary obstructions."

While some technical questions are raised as to the

sufficiency of both the bill and demurrer, which might, if found controlling, temporarily dispose of this case, we conclude that the pleadings, considered as a whole, fairly put in issue the really important and vital propositions involved. Taking all the allegations of fact in complainant's bill as true, with the prayer for relief following, met by the portion of defendant's demurrer which urges that, under the facts stated, complainant nevertheless had from the city but a permissive use of the space occupied, that he acquired no title or right by virtue of his alleged lease, and that "adverse possession cannot be obtained by occupation of a public highway with temporary obstructions," the grounds of demurrer stated sufficiently apprise complainant of the city's contention, and fairly raise the questions of law which must dispose of this case in its final analysis.

Counsel for complainant in a very able and candid brief has clearly mapped out the field of fair contention within the range of conflicting authorities, frankly conceding an adverse line of decisions in other jurisdictions and urging his propositions squarely on the ground that in Michigan, contrary to the doctrine in many other States, title by prescription may be acquired to public property, and contending that this bill ought to be sustained, not only on the ground that title by adverse possession is shown, but also because the contemplated injury sought to be restrained is threatened under a claimed right to summarily remove complainant's fruit-stand from the street and abate it as a nuisance before any legal determination by competent authority that it is such; that the municipal authorities can and should first institute proceedings in the courts for a determination of that question and obtain an order of abatement, the existence of a public nuisance being a question to be first determined by a court or jury before summary measures can be taken by the officials to suppress it.

Considering first the question of title by adverse possession, as frankly conceded by complainant's counsel, the great weight of authority in the United States is to the effect that title by prescription cannot be acquired against a city. The principle upon which this rule is founded is said to be that a city merely holds title to its streets and possession of them in trust for the general public, and has no authority to dispose of them or their use for other purposes, by lease, license, sale, or gift. This is recognized as a general rule of law by most of the text-writers upon municipal corporations, and, with due notice of and deference to conflicting views in certain jurisdictions, is well stated in 3 McQuillin on Municipal Corporations, § 1396, as follows:

"There is much conflict in the decisions as to whether the right to a street or alley may be lost by adverse possession. In a few States such property is looked upon the same as any property held by an individual, and the maxim *nullum tempus occurrit regi* is considered not applicable to municipal corporations, so far as street and alleys are concerned, and hence title can be acquired to all or a part of a street by adverse possession. However, the great weight of authority is to the contrary, and it is held in nearly all the States that the rights of the public in a street or alley cannot be divested by adverse possession of another for the statutory period. * * *"

Seven States, including Michigan, are enumerated as holding, or having held, contrary to the general rule. Several of these States, including Michigan, have been brought into line with the general rule by subsequent legislation, following the decisions rendered by their courts holding otherwise.

By Act No. 46, Pub. Acts 1907, it is provided that:

"Hereafter no rights as against the public shall be acquired by any person, * * * by reason of the occupation or use of any public highway, street or alley," etc.

While up to the time of enacting the above statute the law was well settled in Michigan, as stated, and must control as to rights arising prior to the act, in view of this legislation and the great weight of authority throughout the United States, we are not disposed to enlarge the scope or go beyond the imperative requirements of those former decisions, in passing upon prescriptive rights to a portion of a street, claimed to have matured before the act went into effect.

In some States it is held that all obstructions or encroachments upon streets which are not in some manner connected with or related to the use of the streets as public thoroughfares are *ipso facto* nuisances. Such is not the rule in this State. It has been held that many encroachments which otherwise have none of the characteristics of a nuisance *per se* are not to be treated as nuisances merely because intruding on public highways. *People v. Carpenter*, 1 Mich. 273; *Everett v. City of Marquette*, 53 Mich. 450 (19 N. W. 140).

Counsel for complainant cites as particularly appropriate and in point the following cases arising in the same city as the instant case: *Flynn v. City of Detroit*, 93 Mich. 590 (53 N. W. 815); *Leonard v. City of Detroit*, 108 Mich. 599 (66 N. W. 488); *Vier v. City of Detroit*, 111 Mich. 646 (70 N. W. 139). Those decisions and numerous others of this court squarely sustain said exceptional doctrine of title against the public by prescription, which is thus concisely stated in *Flynn v. City of Detroit*, *supra*:

"It is settled in this State that title may be acquired by adverse possession of property within the limits of streets. *City of Big Rapids v. Comstock*, 65 Mich. 78 [31 N. W. 811]; *Village of Essexville v. Emery*, 90 Mich. 183 [51 N. W. 204]."

It is to be observed in the cases cited, and others which may be found of like import where title has

been sustained under this rule, that the purpresture involved was not only untainted by any characteristics suggestive of a nuisance *per se*, but supported by clear proof of an unequivocal, exclusive, and distinct possession connected with, and arising out of, such uses and obstructions of a permanent nature as to make manifest the intent, and amount, in effect, to an assertion of a right hostile to the rights of the public, being initiated by inclosing an alley or part of a street by fences, or walls, the erection on the owner's lot of a building which projected with some of its parts over the street line, building steps rising above, and basement stairways through sidewalks on the street, etc.

Consulting complainant's bill for information as to the exact nature of his possession of the premises claimed, we find it described as located entirely within the limits and at the intersection of two public streets, adjacent to a corner lot. The bill alleges that he and his predecessors owned and operated a "fruit-stand" on a designated street corner continuously since 1890, occupying with, or by, "said stand" a strip of sidewalk next to said lot two feet four inches in width, extending back from the corner on each street about eight feet; that they leased said premises on which said fruit-stand was conducted from the owner of the adjacent lot, and paid rent therefor. It is also alleged in positive terms that the possession relied upon was open, hostile, adverse, etc., but such assertions, in their nature conclusions, are to be read and interpreted in connection with all other statements and allegations of facts appearing in said bill, which qualifies such possession by alleging that it was—

"through your orator and the other prior owners or lessees of said stand, and by reason of the continuous payments of rents to the owners or lessees of said lot."

So far as physical features of the fruit-stand are concerned, no definite information is given. What

fixtures, structures, appliances, or conveniences for the business occupied the space claimed is left to conjecture, or to inference from the name given to that which it is alleged was located there. The nature of the use, occupation, and possession of the space, and even of the business carried on there, is only disclosed by the allegations that complainant and those before him "owned," "operated," "conducted," "purchased," and "sold" said "fruit-stand" which was located on and occupied said premises. No special features or attributes being pointed out peculiar to this fruit-stand, it is to be taken for whatever that compound word generally implies, and its possession of the kind which generally goes with the operation or conduct of such an enterprise. While it can safely be said that those speaking the English language have in a general way a quite definite understanding that the word signifies a place where fruit is sold at retail, the lexicographers have given it but scant treatment. It is one of the many compound words coined by combining a word indicative of some minor line of business activity, designed to meet the temporary desires or necessities of the passers-by, with the word "stand," such as news-stand, lunch-stand, cigar-stand, flower-stand, peanut-stand, ice cream-stand, shoe shining-stand, hack-stand, etc.; the words thus combined signifying in a general way, when not further qualified, some place where the named business is conducted, whether indoors or out. It is a matter of common knowledge, and has been recognized by courts, that certain of the lines of business activity to which such names are given are more or less closely related to hawking.

"The business of one who sells or offers goods for sale on the streets, by outcry, or by attracting the attention of persons by exposing his goods in a public place, or by placards, labels, or signals." Black's Law Dictionary.

These peculiarities of such business, which often result in aggressive competition and annoying intrusion upon the public streets, have given rise to a line of decisions in other States sometimes called "fruit-stand cases." In those opinions the courts, when squarely confronted with the question, have almost universally held that such vending stands, when maintained in the streets of a city, are public nuisances *per se*.

As those decisions are from States where the right to acquire title against a city by adverse possession is not recognized and in some the authority of a city to license use of its streets for places of traffic is denied, they are not in their entirety of controlling significance here, but the views there expressed of the nature and general attributes of "fruit-stands" and like places of barter on public thoroughfares is worthy of consideration.

In the early case of *Commonwealth v. Wentworth*, 4 Clark (Pa.), 324, decided in 1823, it was held to be a public nuisance, indictable at common law, to place on the footway of a street in the city of Philadelphia a stall for the sale of fruit and confectionery, although the defendant paid rent to the owner of adjoining premises for so much of the street as was so occupied. The subject is reviewed in an exhaustive and able opinion by Justice Head, in *Costello v. State*, 108 Ala. 45 (18 South. 820, 35 L. R. A. 303), where it was held that a fruit-stand, though erected on the covering of the open way through a sidewalk to a cellar, was an indictable nuisance, the court saying, amongst other reasons given:

"And to this must be added, as a necessary legal inference, from the fact that these stands were used for carrying on the business of selling fruits, etc., the permanent occupation of the sidewalk by the person or persons * * * making the sales; and by the

standing thereon, from time to time, day by day, of customers trading at such stands."

See, also, *City of Chicago v. Pooley*, 112 Ill. App. 343; *Galloso v. City of Sikeston*, 124 Mo. App. 380 (101 S. W. 715); *State v. Berdetta*, 73 Ind. 185 (38 Am. Rep. 117); *Schopp v. City of St. Louis*, 117 Mo. 131 (22 S. W. 898, 20 L. R. A. 783); *People v. Keating*, 168 N. Y. 390 (61 N. E. 637).

That the fruit-stand is an encroachment upon, and obstruction of, a portion of a public street of the city appears from the bill of complaint. It is alleged that neither complainant "nor any of the prior owners of said stand have ever operated or conducted the same by reason of any permit issued by the department of public works of the city of Detroit, or any person," etc. It was maintained there in violation of a city ordinance.

The charter of the city of Detroit (section 175) gives the common council power to prohibit and remove all encroachments upon and obstruction in public streets, avenues, and spaces in said city by buildings, fences, or any other manner. We are not advised of any buildings or fences in this case. The exclusive possession claimed is stated to be a fruit-stand operated by its owners. A fruit-stand in operation on the sidewalk of a public street is both an incumbrance and obstruction.

By an ordinance of some length, passed in 1894 (chapter 60, Comp. Ord. 1912), obstructing and incumbering streets and other public places with buildings, boxes, etc., is prohibited with certain exceptions, authorizing, under permission obtained from the department of public works, temporary use of sidewalks in front of business places in elevating and receiving heavy merchandise, and other customary use and occupation of streets in connection with business con-

ducted on adjacent property, not to obstruct public travel—

“With a proviso, that nothing herein contained shall be construed to grant authority to any owner or occupant of any premises to let, sublet, rent, lease or grant, where such use and occupation will not obstruct public travel, free use of, to any person whatsoever, any of the sidewalk space (meaning the space between the lot line of the property and the curbstone or any space outside of the lot line, on, above or below ground) for business stands of any kind, or for any purpose whatsoever; and any person so found doing business may be summarily removed by the department of public works or the metropolitan police and be deemed a violator of this ordinance.”

The ordinance further prohibits structures or framework covered or uncovered, attached to or in front of any building, extending into the street beyond any lot line, and authorizes summary removal of same after 24 hours' notice from the department of public works.

It was after a notice from the commissioner of public works of an intention to enforce this ordinance, served upon John Pastorino, that complainant bought back the fruit-stand and filed this bill basing his claim of right to remain undisturbed on the strength of his landlord's title by adverse possession. There is no intimation in the bill that the city officials or the public generally had any notice or knowledge that the relation of landlord and tenant existed between the changing owners and operators of this fruit-stand in the street and the owner of the adjacent property in direct violation of a city ordinance, and, if any presumptions arise, they would be to the contrary.

While the bill alleges the possession was notorious, there is no allegation that its vicarious character was notorious.

It is contended in behalf of complainant that in the demurrer and argument defendants assume without

warrant that the fruit-stand is a "temporary obstruction," a fact not admitted in the bill, but, in substance, alleged to the contrary, it being distinctly stated that said stand had remained continuously, and in effect, permanently, on the one spot described since 1890, and before; that, in any view, whether or not the obstruction in this case is temporary or permanent is a question of fact to be determined as an issue in the case.

The length of time the obstruction may have remained in the street does not determine its character. Whether it is to be regarded as temporary or permanent depends upon what it is. In the light of views expressed by courts having occasion to deal with the subject, as well as from common knowledge and definition, we have no hesitancy in concluding, as a matter of law, that "fruit-stands" located on the sidewalks of public streets are not, as such, permanent obstructions, in the sense the term is used by courts and applied to inclosures, substantial structures, steps, stairways, walls, and other physical attachments to the soil of a permanent nature, obtruding upon and obstructing a street.

The scheme of complainant's bill founds his claim for equitable relief on a title by prescription in the owner or owners of the adjacent lot, to a portion of the street in front of the property. The owner is not a party to the suit. Who, or what, or how many such there are, or what he, she, it or they personally claim is not disclosed. The case, however, must turn on the question of a title in the unknown owner or owners. In *Fuller v. City of Grand Rapids*, 105 Mich. 529 (63 N. W. 530), the general rule relative to obtrusions upon streets by adjacent owners is thus stated:

"Owners of adjacent lands acquire no permanent rights in the public streets by the erection of structures for their own use and benefit. So long as the

space so occupied is not required for public use, they are usually permitted, but, when the public demands it for the use for which it has been condemned or dedicated, the private use must go, and the structures be removed. The opportunity to remove them is all the right the law gives the owners."

Much less would they acquire permanent rights if, while quietly remaining undisclosed, they privately, though for a consideration, allowed others who were strangers to their ownership of the adjacent property to establish a fruit-stand in the street for their own use, but a joint benefit. It is unquestioned that adverse title may be acquired through possession held by a tenant, but it is elementary that, whether the claimant acts in person or through a tenant, he must show a disseisin and unequivocal assertion of title in himself as against the original holder of the title, and as bearing upon the adjacent owner's claim of right in support of his title being brought home to the city this is a consideration, for there is no allegation in the bill or claim that any notice was ever given to the city that the adjacent lot owner claimed or intended to claim title to a portion of the street held in hostility to the city, beyond the fact that the owners of the fruit-stand were openly in possession and doing business there.

Though the bill states said stand was not conducted by reason of any permit from the department of public works, it is manifest that the possession was in its inception, when ascribed to the adjacent owner, as it is here, by mere indulgence, sufferance, or implied permission, and of the character stated in *Fuller v. City of Grand Rapids*, *supra*, which might continue so long as the space occupied was not required for public use, and which could not ripen into a title however long continued until there was a disseisin by change in the nature of the possession and an ex-

pressed, hostile, adverse assertion of title. 14 Cyc. p. 1152.

In this case we are dealing with the right of an adjacent owner to set up a fruit-stand on the sidewalk beyond his lot line, and, by operating it there for the statutory period in the usual way, acquire title to that portion of the street he has cumbered with it.

A fruit-stand upon a public highway is not, in its basic characteristics, a permanent obstruction of the class by which title may be acquired by prescription. The name itself imports locality and a huckstering business combined. The place would not be a fruit-stand unless the business of selling fruit was carried on there.

When established on a sidewalk in a public street, it has been held a nuisance *per se*, and to maintain it a public offense. It is within the police power of the city of Detroit under its charter to summarily remove, in a reasonable manner, after proper previous notice, "any person so found doing business," and any obstructions found on the public streets in connection with said business.

The following language by Justice GRANT in *Weber v. City of Detroit*, 159 Mich. 14 (123 N. W. 540, 36 L. R. A. [N. S.] 1056), relative to the adjoining owner acquiring title to public property by prescription is appropriate and well in point here:

"There was nothing in appearance to indicate a permanent, hostile, or adverse possession. It is common knowledge that merchants are permitted, without objection by the public, to occupy parts of streets and sidewalks in front of their stores to exhibit goods for sale. It has never been held that by so doing they could acquire title by adverse possession. They occupy these portions of the public thoroughfares by permission, and not in hostility to the public. * * *

"Under complainant's contention, every occupancy by an adjoining owner of the unused portion of a public highway or street along its sides for the storage or

display of merchandise would result in depriving the municipalities of a portion of their streets if such occupancy were continued for the statutory period. Such holding is not in accord with authority or sound reason."

The decree of the court below dismissing said bill of complaint is affirmed, with costs.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

HILLS v. BLAIR.

1. MASTER AND SERVANT—INDUSTRIAL ACCIDENT BOARD—DEATH—WORKMEN'S COMPENSATION LAW.

Where a section hand was killed while he was returning home at noon for dinner, being struck by a passing train, the burden rested on his representatives to show, in proceedings before the accident board, that death resulted from an accident arising out of and in the course of his employment.

2. SAME—APPEAL AND ERROR—CERTIORARI TO INDUSTRIAL ACCIDENT BOARD.

Findings of the industrial accident board which are supported by facts or inferences from the testimony must be taken as true on certiorari.

3. SAME—EMPLOYMENT—DINNER HOUR.

Accidents to employees in the act of going to or from their work are not usually regarded as arising out of the employment or in the course thereof.

4. SAME—RAILROADS.

The fact that decedent was still on the premises of his master, at a considerable distance from the place at which his work was done, did not bring him within the ex-

ception to the rule which has been recognized in certain cases when the servant was so near the place of his employment as in effect to be within the protection of the law.

Certiorari to the industrial accident board. Submitted June 22, 1914. (Docket No. 53.) Decided July 24, 1914.

Leone H. Hills applied for an award of compensation for the injury and death of her husband, Irwin E. Hills, an employee of Frank W. Blair and others as receivers of the Pere Marquette Railroad Company. From the award granted, defendants bring certiorari. Reversed.

O. C. Trask (McArthur & Dunnebacke, of counsel), for applicant.

Parker, Shields & Brown (S. L. Merriam and J. C. Bills, of counsel), for respondents.

STEERE, J. This is an appeal by respondents, as receivers of the Pere Marquette Railroad Company, from an award of compensation made by the Michigan industrial accident board for the accidental death of Irwin Hills, at Williamston, Mich., on November 16, 1912, while he was an employee of said railway, as a section hand. The facts in the case as testified to by witnesses are practically undisputed. The controversy is over inferences which may be drawn from the facts proven, and conclusions of law thereon.

On the day in question Hills was working during the forenoon at his regular employment in a section crew along respondent's railway track east of Williamston. The crew returned to Williamston with their hand car and stopped for dinner at the hand car house by the south side of the track shortly after 11 o'clock, standard time, putting the car inside preparatory to taking their meal. As they were return-

ing, the smoke of a train coming from the east was seen in the distance. It was customary for the men to carry their dinners with them and eat together at or near where they were at work; but on this day deceased had not waited in the morning for his dinner to be put up by his wife, and hurried away to his work, saying that if he could get excused he would be home to dinner. After the men had put the hand car into the car house and the others were proceeding to eat their noonday meal, Hills took his coat and told the foreman that he was going home for his dinner, to which the foreman assented, and he hurried away. Just as he left the car house, the foreman, when reaching for his dinner pail, noticed a freight train coming from the east "about four or five pole lengths from the car house," meaning the distance between telegraph poles, and told Hills to look out for it. Answering that he would be all right, Hills hurried down the railway track in a westerly direction towards the station. The car house at which the section men ate their dinner was located 1,934 feet east of the station, while Hills' home was about half a block north of it; 225 feet west of the car house a street crossed the railway tracks intersecting a wagon road which ran east and west, parallel with the railroad and just to the north of it. One of the section hands saw Hills go west on the track as far as the street crossing. He could have left the railroad at that point by the public street and gone home along the wagon road on the same side of the railroad as his home. This road, however, though open to the public, was not in good condition for travel. The men employed in the yards were accustomed to enter and leave at the station, going to the car house and elsewhere along the tracks as they found it most convenient. There was also a footpath along the railroad right of way between the main track and a side track, upon which they could walk in safety. The

freight train, which the foreman had noticed and warned Hills of, was coming from the east on the main track of the railway and passed through the village of Williamston without stopping. It was the custom of such trains when approaching Williamston to shut off steam and slow down to from 8 to 12 miles an hour until they could catch the signal, when, if a stop was not indicated, they would increase their speed and proceed without stopping. No stop signal was set for this train on the day in question, and it passed through the yards between the car house and the depot at an estimated speed of from 15 to 18 miles an hour. The conductor and fireman of the train testified that before catching the signal the train slowed down to 10 or 12 miles. A witness named Whipple, who was loading a car with hay at some sheds located 12 or 15 rods west of the hand car house, testified that as the train was approaching he saw a fellow coming from the west on a run pulling on his coat, and noticed him stop on the north side of the track and look to the east; from his actions witness thought he was a brakeman waiting for the train, and that the train stopped, but "they hit up quite a clip just as soon as the engine got by there;" that this was about 50 rods from the place where the man was killed by the switch. Being asked if the man he then saw was deceased, he replied:

"It was a man with a fur cap on, and when I see who was lying on the ground it looked just like the coat he was putting on and the cap he had on, and that is all I know about it."

A short time after the train had passed, the body of Hills was found lying beside the main track approximately 950 feet west of the hand car house and about 1,000 feet east of the depot near a stub switch, a lantern prong of which was bent to the west. There were no eyewitnesses to the accident. The manner in

which it occurred was a matter of inference from surrounding facts and circumstances proven.

It was the theory in behalf of claimant that deceased was accidentally struck by the train as he was traveling along the track towards his home and thrown against the switch standard which stood about 20 feet east of where his body was discovered. Respondents contended that shortly after leaving the car house, and near the highway crossing, deceased boarded the train, which was moving slowest at that point, intending to ride as far as the depot, near his home, and drop off, but that as the train increased its speed on approaching the depot, after ascertaining that there was no signal set for a stop, he either jumped or fell, striking the switch standard, and was thereby killed.

The industrial accident board apparently adopted claimant's theory that deceased walked, or ran, along the railway ahead of the oncoming train for a distance of 930 feet from where he left his fellow workmen at the car house, before the train overtook him at the switch, when, as he started to pass by the light standard on the south near the track, he "walked a little too close to the car and was struck by the train and thrown against the light standard; the force of the impact hurling his body about 20 feet to the west." The board found as a fact that deceased, on his way from the car house to his home for dinner, "was accidentally struck by said train while he was traveling towards the depot and was thrown against the switch standard mentioned in the evidence, causing death." As a conclusion of law it found that:

"He was still his master's servant while so in the act of leaving his employment, and that the employment covers not only the time during which the workman is engaged in his ordinary labor, but also a later time during which he is passing from the surroundings of his employment into surroundings unrelated thereto." Also holding "that deceased was killed by

an accident arising out of and in the course of his employment."

Under the provisions of this act, only that employee is entitled to compensation who "receives personal injuries arising out of and in the course of his employment." It is to be borne in mind that the act does not provide insurance for the employed workman to compensate any other kind of accident or injury which may befall him. The language of the Michigan compensation law is adopted from the English and Scotch acts on the same subject, and, in harmony with their interpretations, has been construed by this court, in *Rayner v. Furniture Co.*, 180 Mich. 168 (146 N. W. 665), as meaning that the words "out of" refer to the origin, or cause of the accident, and the words "in the course of" to the time, place, and circumstances under which it occurred.

In *Ayr Steam Shipping Co., Ltd., v. Lendrum*, 6 B. W. C. C. 326, involving a fatal accident attended with uncertainty as to details, the court said:

"I think one may deduce from the decisions (1) that the burden is always upon the applicant to prove that death resulted from an accident arising out of as well as in the course of the employment; (2) that such proof need not be direct but may be by circumstantial evidence, but there must be facts from which an inference can be drawn, as distinguished from mere conjecture, surmise, or probability; and (3) that an award by an arbiter cannot stand unless the facts found are such as to entitle him reasonably to infer his conclusion from them."

It is contended by appellants that the facts proven here do not in reason support the inference of the board as to the manner in which deceased met his death, but, on the contrary, conclusively show that he was killed in an attempt to board or leave a moving train, precluding any award under the ruling in *Pope v. Hill's Plymouth Co.*, 5 B. W. C. C. 175, in which case a workman in a colliery going home to his din-

ner on the premises of his employer was killed in attempting to jump on a passing tramcar. It is further urged as a defense that, if it cannot be said as a matter of law a finding of fact should have been made as appellants contend, it should at least be held that the proven facts are equally consistent with either one of the two alternatives, and no inferences can legitimately be drawn to support an award.

We are not prepared to hold that the findings of fact, as to the manner of the accident, are entirely without evidential support, either direct or by inference. They are therefore to be taken as conclusive under the statute. Accepting them as such, do they sustain the conclusion of law that Hills' death arose out of and in the course of his employment?

It is well settled that the burden rests upon the one claiming compensation to show by competent testimony, direct or circumstantial, not only the fact of an injury, but that it occurred in connection with the alleged employment, and both arose out of and in the course of the service at which the injured party was employed.

While occasional exceptions are noted, as in the case of most rules, it is laid down by the authorities as a general rule that accidents which befall an employee while going to or from his work are not to be regarded as in the course or arising out of his employment. *Boyd on Workmen's Compensation*, § 486; *Harper on Workmen's Compensation*, § 34; 1 *Bradbury on Workmen's Compensation* (2d Ed.), p. 404.

This inquiry, therefore, narrows down to whether this is an exception to the general rule. As deceased was doing no work he was required to perform in fulfillment of his contract of employment, the contention that it is an exception rests mainly upon the claim that when killed he was yet on the premises of his employer, going from, and in the vicinity of, his place of employment. No question is involved of exceptions

by the terms of hiring, of the employee being required to work overtime, or of any interruption, unusual kind of work being done, or other special circumstance in connection with the employment. The only unusual and special thing shown in that connection is the fact that at the noon hour, contrary to previous usage and custom, he left his place of employment and fellow workmen to go elsewhere on a mission of his own, not connected with his employer's business, but to please himself; the occasion being that he had failed to bring with him his dinner as was customary with the crew and as he had always done before. Can it be said that he was then engaged in his employer's business, discharging any duty or on any errand connected with his employment?

In applying the general rule that the period of going to and returning from work is not covered by the act, it is held that the employment is not limited by the exact time when the workman reaches the scene of his labor and begins it, nor when he ceases, but includes a reasonable time, space, and opportunity before and after, while he is at or near his place of employment. One of the tests sometimes applied is whether the workman is still on the premises of his employer. This, while often a helpful consideration, is by no means conclusive. A workman might be on the premises of another than his employer, or in a public place, and yet be so close to the scene of his labor, within its zone, environments, and hazards, as to be in effect at the place and under the protection of the act, while, on the other hand, as in case of a railway stretching endless miles across the country, he might be on the premises of his employer and yet far removed from where his contract of labor called him. The protection of the law does not extend, except by special contract, beyond the locality, or vicinity, of the place of labor.

"It is not a sufficient test that the workman should be on the premises of the employer; but it may be sufficient that he is in such a state of proximity as may be treated as a reasonable margin in point of space." *Hoskins v. Lancaster*, 3 B. W. C. C. 476.

Upon this subject, and leading directly to the protection which the act gives the employee during the noon intermission, it is said in *Boyd on Workmen's Compensation*, § 481:

"A workman's employment is not confined to the actual work upon which he is engaged, but extends to those actions which by the terms of his employment he is entitled to take or where by the terms of his employment he is taking his meals on the employer's premises. (*Brice v. Lloyd*, 2 B. W. C. C. 26.) In other words a workman does not lose his character as a workman while eating his lunch on his employer's premises at a place where he may safely do so and not at an especially forbidden place or a place of obvious danger. But this rule would not apply to cases where the employee leaves the premises of his employer to eat his lunch during the time set apart for this purpose."

To the same effect it is said in *Ruegg on Employers' Liability and Workmen's Compensation*, p. 377:

"In one sense, it may be said to be a part of his duty to get to such place, but if his method of traveling is not controlled by the employer, if he is a free agent, it is thought this qualified duty is not sufficient to raise, at the time, the relation of employer and workman.

"The same may be said with respect to the time occupied in returning home from work, and of intervals allowed for meals when spent off the employer's premises."

The rules of presumption and inference which often go far to assist a claimant in establishing his case where a workman is found dead at the scene of his labor are of scant application here. When the employee dies at his post of duty, a presumption may reasonably be entertained that he was then perform-

ing his duty and engaged in the work for which he was employed, from which a causal relation between his employment and the accident may be inferred; but it is shown here that deceased left the locality and sphere of his employment at a time when work was suspended, that he was doing nothing within the scope of his employment, was not under the direction or control of his employer, and went away for purposes of his own, going where and as he pleased. Though he was traveling on his employer's premises when injured, he was then 950 feet away from where any duty in the line of his employment called him, and had selected his own route. But a short distance from where he left the car house he could have turned by a public street onto a wagon road along which he could have gone to his home, and a safe footpath was also available to him along the right of way. The custom of employees to travel along the railroad in going to and from their work, when it is shown that there was another and safe way which they might have taken, is not of controlling importance. At the same distance deceased was injured, from the place of employment, they would be at most but mere licensees. In *Caton v. Steel Co.*, 39 Scot. L. R. 762, it was held that the injury did not arise out of and in the course of the employment of a laborer who, at the conclusion of his day's work, was knocked down and killed by a passing engine 230 yards from where he had been working, while walking home along a private railway track belonging to his employer, which many of the men employed at the same place were in the habit of using in going to and from their work. The court there said:

"The deceased at the time of the accident had ceased his work, had left the place where he did it, and was on his way home. He had at the time no duty to fulfill to his master, and his master had no duty to fulfill towards him. The relation of master and servant had

ended for the day, he having fulfilled his work and left the place where his work was being done."

Under the undisputed testimony in this case, and accepting the findings of fact made by the board as conclusive, claimant has failed to show such relations of cause and effect between the accident and the duties of the party injured to his employer as will support a conclusion of law that the injury arose out of and in the course of the employment.

The decision, or award, herein is therefore reversed and set aside.

BROOKE, KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred with STEERE, J.

MCALVAY, C. J. In my opinion the facts proven were equally consistent with either theory, and no legitimate inference can be drawn to support an award. I am therefore in favor of reversal for this further reason.

LEVITAN *v.* HOUGHTON NATIONAL BANK.

EQUITY—ACCOUNTING—JURISDICTION—ADEQUATE REMEDY AT LAW.

A bill of complaint for an accounting, instituted by complainant as depositor of a national bank, averring that her husband, without authority, had drawn checks on her account in her name, that complainant had warned defendant bank not to honor checks signed by him and that she had executed a mortgage to satisfy an alleged indebtedness to the bank, due to his unauthorized transactions, and that the mortgage was used to satisfy a debt of her husband, that complainant subsequently gave her

note to the bank, which the bill charged was void on the ground of coverture, *held*, demurrable: complainant had an adequate remedy at law and the court of equity would not interpose its jurisdiction to require the surrender of jewelry and other valuables in the possession of defendant bank. BIRD and MOORE, JJ., dissenting.

Appeal from Washtenaw; Kinne, J. Submitted June 18, 1914. (Docket No. 107.) Decided July 24, 1914. Rehearing denied December 19, 1914.

Bill by Rae Levitan against the Houghton National Bank, for an accounting. From an order overruling a demurrer to the bill of complaint, defendant appeals. Reversed.

Arthur E. Fixel and *Max H. Finkelston* (*Selling & Brand*, of counsel), for complainant.

Allen F. Rees (*Rees, Robinson & Petermann*, of counsel), for defendant.

MOORE, J. This is an appeal from a decree overruling a demurrer to a bill in chancery. Stripped of its formal parts and its legal verbiage, the bill of complaint avers in substance: That complainant had a personal savings account and a personal commercial account in defendant bank. That she was formerly the wife of David Levitan, from whom she has been divorced. That complainant purchased and sold copper stocks through the agency of said bank. That during the same time her said husband also purchased and sold copper stocks through the agency of said bank. That, without authority from her, said bank paid out of her commercial account upwards of \$7,000 upon checks signed in her name by said David Levitan without her knowledge or authority. That said bank now claims that complainant is indebted to it in the sum of upwards of \$9,000, and that she believes the said debt is the debt of David Levitan, who became a

bankrupt in June, 1909. That said Levitan liquidated his said debt through the cashier of said bank, which result was brought about by giving a mortgage on the homestead of the complainant, which was signed by her on her understanding that it liquidated the debt referred to.

We quote from the bill of complaint:

"(9) Your oratrix shows: That the said David Levitan concealed his stock transactions from your oratrix. That your oratrix had distinctly forbidden him to trade in stocks in her name. That your oratrix had distinctly cautioned the defendant, the Houghton National Bank, to refuse to honor orders, checks, and notes given by him on her bank account, whether signed in his name or in the name of your oratrix. Your oratrix shows: That said defendants connived at the unlawful and unauthorized transactions of said David Levitan with the money of your oratrix, honored orders and checks signed by said David Levitan, and paid same out of the commercial account of your oratrix at said bank. That such transactions were carried on without the knowledge or consent of your oratrix.

"(10) Your oratrix further shows: That in the year 1907, before the failure of the said David Levitan in his business in L'Anse, Mich., your oratrix underwent a surgical operation in Chicago, State of Illinois. That after going home from Chicago, Ill., to L'Anse, Mich., your oratrix called at the Houghton National Bank. That your oratrix was importuned by the said William McLaughlin, who was the cashier of the defendant bank, to sign a certain note. That your oratrix had had very little business experience and relied entirely on what said William B. McLaughlin told her. That your oratrix at first refused to sign said note. That your oratrix was in a very weak condition physically by reason of the recent operation performed on your oratrix. That the said William B. McLaughlin detained your oratrix at the bank of the said defendant at Houghton, Mich., for a long period of time, to wit, four hours, during which time the said William B. McLaughlin, by various representations,

artifices, and threats, finally succeeded in getting the signature of your oratrix on said note.

"(11) Your oratrix shows: That she has no knowledge as to what the said note was given for, nor does she know the amount of said note or anything in connection with it. That your oratrix had heard from her former husband, the said David Levitan, that William B. McLaughlin could be relied upon for all purposes. That your oratrix had always had her business transactions at the Houghton National Bank with the said William B. McLaughlin. That your oratrix, on the occasion of signing said note, did so on the representations of the said William B. McLaughlin that your oratrix was incurring no liability by the signing of said note. That said David Levitan was indebted to the bank in a large amount. That your oratrix, by signing the said note, was rendering her husband, the said David Levitan, great assistance. That, unless your oratrix signed the said note, the said David Levitan would get into trouble with his creditors and would lose his business. That by reason of an indebtedness to said defendant on the said home at L'Anse, Mich., your oratrix and David Levitan might be put out of their home. Your oratrix further shows unto the court that yielding to the solicitation of the said William B. McLaughlin to sign the said note (having no idea that she was signing a note for unauthorized purchases of stock made in her name) after being detained at the bank in her weakened condition for almost four hours, and being unable to judge for herself as to the propriety of her signing said note, and being unable, because of her physical condition and because of the influence exerted over her by the said William B. McLaughlin, to judge for herself what she was doing in reference to her property rights, at the direction of the said William B. McLaughlin, caused her signature to be affixed to said paper now alleged to be a note for \$9,736.69. * * *"

The bill then states various transactions and memorandums.

"(20) Your oratrix further shows: That about the 1st day of October, 1907, your oratrix delivered for safe-keeping to the said defendant her diamonds valued

at about \$1,000. That said diamonds were not given to the said defendant as a pledge or to secure any account of your oratrix or of any other person. * * * That she requested a statement of account from the said defendant. That your oratrix likewise made demand of the said defendant to return to her her diamonds, which request was refused by the said defendant. * * *

The bill of complaint avers: That complainant relied entirely upon the statements of the cashier of defendant bank.

"That as a consequence your oratrix does not know all of the amounts withdrawn from her credit at said defendant bank on memorandum checks. That your oratrix does not know the exact amount received on the sale of her Houghton National Bank stock. That your oratrix, at the present time, does not know the exact amount of money secured by the said defendant from the savings account of your oratrix at the Marquette National Bank. Your oratrix further shows that she does not know the amounts of the unauthorized charges against the account of your oratrix at said bank on checks signed in the name of your oratrix by the said David Levitan, and that your oratrix has no complete records of the stock purchases and sales made through the agency of said defendant for your oratrix or for said David Levitan in the name of your oratrix, for which moneys were borrowed in the name of your oratrix at said bank. * * * Your oratrix shows: That she must therefore have a complete and true accounting from the said defendant with reference to all of its transactions involving the commercial account of your oratrix at the said bank. That your oratrix is entitled to such accounting, so that every charge made against the account of your oratrix can be identified, and so that those charges which were made at the direction of the said David Levitan and for his benefit may be segregated from those withdrawals which your oratrix herself made from her said bank account. That, should it be determined after such accounting that any of the items charged against the account of your oratrix do not represent an indebtedness or an obligation of your oratrix, your

oratrix may have a decree for the amounts so found to be due her from the said defendant, the Houghton National Bank."

The bill of complaint prays, among other things, for an accounting and for a decree for the amount due complainant.

"That the court decree the surrender to your oratrix of the diamonds and jewelry belonging to your oratrix and now in the possession of said defendant. * * * That, by reason of the coverture of your oratrix at the time of signing said alleged note, the said note is not a valid obligation for any indebtedness which is not chargeable to the dealings of your oratrix with her individual property. That, should the court find that any part of the indebtedness evidenced by said note is a liability of said David Levitan, the court order said note to be canceled and delivered up to your oratrix. That the court restrain said defendant from transferring, assigning, or disposing of said alleged note pending the hearing in this cause."

There were prayers for other relief and a prayer for general relief.

The defendant demurred to the bill of complaint, assigning five reasons, but the important one argued in the briefs and in the oral argument of the solicitor for appellant is that:

"The said bill of complaint on its face shows that complainant has a full and adequate remedy at law for the several claims and demands set forth in said bill of complaint."

Many cases are cited, and an elaborate argument is made on the part of appellant. We shall not attempt to analyze the bill of complaint or make a criticism of the cases. The demurrer of course admits the truth of such of the averments of the bill of complaint as are properly pleaded. The court below, in decreeing that the bill of complaint made a case for the exercise of chancery jurisdiction, is justified by the following cases: *Blodgett v. Foster*, 114 Mich. 688 (72 N. W.

1000, 68 Am. St. Rep. 504); *Excelsior Wrapper Co. v. Yund*, 176 Mich. 372 (142 N. W. 353); *Kirby v. Railroad*, 120 U. S. 130 (7 Sup. Ct. 430); *Tompkins v. Hollister*, 60 Mich. 470 (27 N. W. 651); *John Hancock Ins. Co. v. Dick*, 114 Mich. 337 (72 N. W. 179, 43 L. R. A. 566); *Mactavish v. Kent Circuit Judge*, 122 Mich. 242 (80 N. W. 1086); *Edwards v. Investment Co.*, 132 Mich. 1 (92 N. W. 491); *Township of North Allis v. Allis Township*, 142 Mich. 137 (105 N. W. 139); *Fred Macey Co. v. Macey*, 143 Mich. 138 (5 L. R. A. [N. S.] 1036), and the many cases cited in the two opinions in the last-named case.

We think the averments of the bill of complaint are sufficient to call for an answer and proofs.

The decree of the court below should be affirmed, with costs, and defendant allowed the usual time in which to answer.

BIRD, J., concurred with MOORE, J.

STONE, J. I think that the demurrer should have been sustained on the ground that complainant has an adequate remedy at law.

MCALVAY, C. J., and BROOKE, KUHN, OSTRANDER, and STEERE, JJ., concurred with STONE, J.

STRONG v. CHANEY.

PLEDGE—CORPORATE STOCK—TITLE.

Upon an issue of fact as to the ownership of certificates of certain shares of stock, evidence considered, and held, to justify the trial court in granting complainant the relief prayed, and in finding that defendant was in possession as pledgee, the indebtedness secured having been paid.

Appeal from Wayne; Hally, J. Submitted June 4, 1914. (Docket No. 18.) Decided July 24, 1914.

Bill by William H. Strong against E. Hall Chaney for the surrender of certain shares of stock. From a decree for complainant, defendant appeals. Affirmed.

Lyle G. Younglove, for complainant.

Angell, Boynton, McMillan, Bodman & Turner, for defendant.

MOORE, J. The complainant is president of the Wilder-Strong Implement Company, a corporation doing business in Monroe. In December, 1909, he was president of the Charlevoix Company, which had control of an apartment hotel, known as the Charlevoix in Detroit. The company was in need of funds, and for the purpose of raising money Mr. Strong secured a loan from his wife for \$2,700, and as evidence of that indebtedness gave the note of the Charlevoix Company, indorsed by himself and the treasurer of the company. Mrs. Strong subsequently recovered judgment on this note. As security for the payment of the note Mr. Strong gave to her certain certificates of stock of the Charlevoix Company, also certificates Nos. 8, 9, and 10 of the Wilder-Strong Implement Company

for 150 shares of the common stock, and received a written acknowledgment thereof, and of the purposes for which such certificates were delivered, from his wife. In March, 1910, the three certificates of the Wilder-Strong Implement Company were canceled, and one certificate, No. 21, of the same company, for the same number of shares issued to Mrs. Strong was delivered to her, and remained in her possession until delivered to Mr. Helfman of the firm of Lucking, Emmons & Helfman about January 21, 1911, who delivered the certificate to complainant with other papers. On January 23d, Mr. Helfman gave Mrs. Strong a check for \$2,710.65. The note of the Charlevoix Company had been surrendered and assigned by Mr. Helfman to Grinnell Bros., two or three days prior to that date. Mrs. Strong died in September, 1911, and her son, E. Hall Chaney, and daughter, Isabella C. Chaney, were appointed executors of her will, which was duly probated. E. Hall Chaney at the annual meeting in November, 1911, was elected treasurer, and held that position at the time this suit was started. In March, 1912, complainant asked E. Hall Chaney for the return of certificate No. 21 of the Wilder-Strong Implement Company common stock, and showed defendant, Chaney, the receipt which originally had been given by Mrs. Strong when she received the stock, and subsequently returned to Mr. Strong. Mr. Chaney took the receipt to show his sister, Isabella C. Chaney, who indorsed certificate No. 21 for delivery to complainant. Subsequently defendant, Chaney, refused to surrender the certificate, asserting his belief that it belonged to the estate of his mother. Mr. Strong demanded orally and in writing the certificate, and, his demands being refused, filed a bill of complaint, praying that defendant, Chaney, be compelled to surrender and deliver up the said certificate No. 21. This case was tried in open court. The judge made a decree in favor of the complainant. The case is brought here by appeal.

The single question involved is whether the complainant is the owner of certificate No. 21 for 150 shares of the common stock of the Wilder-Strong Implement Company. If he is such owner, the decree is right.

The appellant contends that as the certificate of stock stood in the name of Mrs. Strong at the time of her death, this affords *prima facie* evidence of her ownership, and that the burden of showing it belonged to the complainant, and has not been met by him. It is also claimed that Mrs. Strong claimed the stock as her own, and that this claim was recognized by the complainant, and that she never delivered the certificate to the complainant nor authorized any one to do so. We have carefully considered these claims in connection with the evidence disclosed by the record. It is agreed that the stock was originally owned by Mr. Strong, and it is clear it was transferred to Mrs. Strong to secure her for a loan she made, which was afterwards put into a judgment. The loan so far as she was concerned was satisfied, and she was paid her money. We think it is also shown that at the time, and as part of the transaction, she caused the certificate to be delivered to a member of the legal firm through whose agency she obtained her money for the loan she had made, and that the certificate was then delivered to Mr. Strong, who claimed that as the debt was paid the stock belonged to him.

We are entirely satisfied that the decree of the court below is justified by the evidence, and it is affirmed, with costs.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

MOSS v. DETROIT & MACKINAC RAILWAY CO.**1. CARRIERS — DUTY TO DEPOSIT PASSENGER AT STATION — NEGLIGENCE—FAILURE TO NOTIFY.**

Evidence tending to show that plaintiff, a girl of about nine, and her brother about four years older, bought tickets and took a train of defendant railway company, the conductor of which agreed to let them know when to alight, that he neglected to tell them, and deposited the children nearly five miles from their destination, so that they were forced to walk back through a snow storm in cold weather nearly seven miles, and the plaintiff suffered from exposure and had a relapse into a serious illness from which she had recently recovered, *held*, to sustain a verdict for the plaintiff and finding that the illness was the proximate result of plaintiff's being carried past her destination.¹

2. TRIAL—SPECIAL QUESTIONS.

Answers to special questions that would not be controlling of the verdict need not be required.

3. CARRIERS—REQUESTS—CONTRIBUTORY NEGLIGENCE.

The court did not err in refusing to submit a request of defendant that if there were places where the children could have stopped and avoided exposure it was their duty so to do.

Error to Bay; Collins, J. Submitted June 10, 1914.
(Docket No. 50.) Decided July 24, 1914.

Case by Pearl Moss, by next friend, against the Detroit & Mackinac Railway Company for failure to carry plaintiff to destination, etc. Judgment for plaintiff. Defendant brings error. Affirmed.

¹ As to what injuries may be deemed the proximate result of discharging passenger at improper place, or one not his destination, see note in 7 L. R. A. (N. S.) 1177.

Henry, Henry & Henry (James McNamara, of counsel), for appellant.

Thomas G. Baillie (R. L. Crane, of counsel), for appellee.

MOORE, J. It is the claim of the plaintiff that on December 23, 1911, her father purchased one one-half fare ticket, and one full fare ticket at the office of the Pere Marquette Railroad in Saginaw, from Saginaw to Linwood. These tickets were to be used by Pearl Moss, who was nine years old, and by William Moss, a brother of Pearl, thirteen years old, who were going to spend Christmas with their grandfather, who lived on a farm about two miles from Linwood. At Bay City the children got a train on the defendant road, and it is claimed that when the conductor took up the tickets he told them he would tell them when to get off; that after passing a number of stations the boy asked the conductor if they had reached Linwood, and the reply was given, "You are away by that place, and you had better hurry and get off;" that the train was stopped, and they were compelled to walk back, and finally to walk to the home of the grandfather, which they reached about 7 o'clock on a cold, stormy day, snow being on the ground, and the children having a suit case to carry. It is claimed the distance they walked was approximately seven miles. It is further claimed that the girl was just recovering from diphtheria, and was made ill, from which illness she had not made a complete recovery at the time of the trial, nearly two years later. From a verdict and judgment of \$380, the case is brought here by writ of error.

It is claimed a verdict should have been directed in favor of defendant: *First*, because no negligence was shown on the part of defendant, which was the proximate cause of the illness of the plaintiff; and, *second*, because plaintiff was guilty of contributory negligence.

It goes without saying that for the purposes of this case the testimony most favorable to the plaintiff must be regarded as true, even though the testimony of the girl and boy as to what the conductor said and did to them is contradicted by the conductor and brakeman. A very elaborate argument is made to show that being carried past the station was not the proximate cause of the illness of the plaintiff.

We do not think it can be said, as a matter of law, that no negligence on the part of defendant was shown. The facts surrounding the occurrence and the inferences to be drawn from them were for the jury. See 6 Cyc. pp. 585-586, and notes; 3 Thompson on Negligence (2d Ed.), p. 355; *Schroeder v. Railway Co.*, 174 Mich. 684 (140 N. W. 968). Nor do we think it can be said, as a matter of law, that this young girl was guilty of contributory negligence. 3 Thompson on Negligence (2d Ed.), p. 361.

A request was made that the court submit to the jury five special questions. The court disposed of this request as follows:

"Counsel for defendant have passed up five questions to be submitted to you. I decline to submit all of them, except question No. 3. My reason for that is that they were not submitted in time for proper consideration, and that I consider them each defective as rejected in some particular."

As to the third question the jury returned they could not agree. We have examined these questions; but it is not necessary to quote them. An answer to them would not be controlling of the verdict. We think the action of the court was not error. *Clement v. Crosby & Co.*, 157 Mich. 643 (122 N. W. 263); *Ward v. Campau*, 161 Mich. 85 (125 N. W. 734); *Malkowski v. Olfs*, 161 Mich. 303 (126 N. W. 199); *Dykstra v. Railway Co.*, 165 Mich. 13 (130 N. W. 320).

Defendant preferred the following request:

"In order to find a verdict against the defendant and in favor of the plaintiff, the jury must determine that the condition of the girl, Pearl Moss, at the time of the commencement of this suit was caused by the negligence of the defendant, or its legal representatives, and if, while at the place where the children left the train there were places for them to stop and remain, thereby avoiding the exposure which followed, it was their duty so to do, and the only damage which the defendant could be chargeable with would be such as resulted from the time they left the train until they could arrive at a place where they could remain without injury to their health, and the great burden of proofs is to the effect that within 300 or 600 feet of the place where the boy claims they left the train there were houses in which they could have waited and avoided any damageable result by exposure."

Counsel also call particular attention to the excerpts from the charge:

"Now it appears that there is an east and west road running through Linwood village, and in going to Linwood village from where they were put off the train, the children walked as far down as that. It also appears that Linwood station is some distance south of this east and west road running through Linwood village. Now, I charge you, as a matter of law, that for a distance between that east and west road running through Linwood village to Linwood station, for walking a distance as far as that on the road the children actually traveled, they cannot recover any damages. But if you find as a fact that the portion of the walk that I have described, viz., from the place where the children got off to Linwood village, less the distance from Linwood Park to that east and west road, for that distance if the plaintiff has sustained injury which you can measure by damages, she is entitled to recover. * * *

"I charge you, as a matter of law, that no contract plaintiff might have had could have carried her beyond Linwood Park on the defendant road; that the evidence shows that she would have had to walk from there to her grandfather's, the home of Peter Camaries; and that you shall not allow the plaintiff

to recover for injuries that may have resulted to her health by reason of walking a distance, equal distance from Linwood Park to the crossing or east and west road running through Linwood on the Michigan Central Railroad, and that there can in no case be a recovery for injuries received in walking the distance from Linwood village to the home of her grandfather,"—and assign error.

The record would not justify the giving of the defendant's request to charge. That portion of the charge we have quoted must have been given in the desire to be so cautious that no error should get into the case.

It is clear that the proximate cause of the long walk taken by the children was the fact that they were carried past their station. If any one has reason to complain of this portion of the charge, it is not the defendant.

The judgment is affirmed.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

In re DINGLEY.

1. CONTEMPTS—PUNISHMENT—CRIMINAL NATURE.

It is not an open question in this State that the court may punish an offender as for criminal contempt: the power is conferred by 1 Comp. Laws, § 1098 (5 How. Stat. [2d Ed.] § 12589), and exists independently of the statute.

2. SAME—TRIAL—JURY.

The issue in cases of criminal contempt is not for a jury but for the court.

3. SAME—PUBLICATION—CRITICISM OF COURT—NEWSPAPERS.

The publication in a newspaper of an article charging the judge, who was presiding over a grand jury, with being the author of an attack upon the prosecuting attorney purporting to issue from the jury, that he used the grand jury for a club to get even with certain citizens of the county, and otherwise criticising his conduct, was a contempt of court, unless the truth of the article could be established.

4. SAME—PRACTICE—JUDGE—DISQUALIFICATION.

While the judge who was criticised was not thereby disqualified from sitting in the contempt proceeding, the better practice is to call in another judge.¹

5. SAME—TIME.

Held, also, that it was improper to proceed with undue haste so as to deprive the offender of a fair opportunity to prepare his case; and that the issuance of an order to show cause dated February 9, 1914, returnable on the 16th of February, on which date the court proceeded to impose punishment, against the protest and objection of his counsel, who asked for more time, did not afford a reasonable opportunity for the respondent to defend himself.

Certiorari to Kalamazoo; Stewart, J. Submitted June 22, 1914. (Docket No. 89.) Decided July 24, 1914.

Contempt proceedings against Edward N. Dingley. From a judgment finding respondent guilty, respondent brings certiorari. Reversed.

Joseph L. Hooper and *Lincoln H. Titus*, for petitioner.

E. M. Irish, *Alfred J. Mills*, and *Charles W. Nichols*, for circuit judge.

MOORE, J. February 5, 1914, a grand jury, sitting in the county of Kalamazoo, Mich., made a report. The relator, Edward N. Dingley, is the proprietor,

¹ As to the qualification of a judge to sit on trial of one for contempt consisting of reflections upon himself, see note in 11 L. R. A. (N. S.) 619.

editor, and publisher of a weekly newspaper called the "Progressive Herald," published in the city of Kalamazoo, and circulating in said city and elsewhere. In the issue of said newspaper of the date of February 7, 1914, the following article appeared:

"A JUDICIAL TIRADE.

"At last the business of the grand jury is concluded and an even dozen indictments have been returned.

"But the indictments have been lost sight of in the bitter attack made by the Circuit Judge against Prosecuting Attorney Bennett.

"The attack comes nominally from the grand jury, but it is a good guess that the Circuit Judge wrote it.

"This epistle has the ear marks of the Circuit Judge. It is a demonstration that the judge has dominated the situation, and has endeavored to use the grand jury as a club with which to get even with some of our citizens whom he does not like.

"The Circuit Judge says that Bennett has drawn money from the county treasury, illegally, that he refused to assist in the prosecution, and that he is incompetent to hold the office of Prosecuting Attorney.

"The really funny part of this communication is the declaration of the Judge that the Prosecuting Attorney has used language 'too filthy, vile and disgusting to be embodied in this report.' Those who are acquainted with Bennett know that this charge is not true. Furthermore, the Circuit Judge, so common report says, often indulges in language that fits exactly his own characterization of the prosecutor's alleged talk.

"Bennett very properly says: 'If I am guilty of this charge why am I not indicted?'

"Special Prosecutor Nichols telephoned Bennett from Lansing hastening to say that he, Nichols, had nothing to do with the Judge's screed.

"Now that Kalamazoo has been dragged through the mire sufficiently to suit the most vindictive and most unbalanced man, it would be a good plan for everybody to stop knocking and say a good word about Kalamazoo and his neighbor.

"The endeavor of all should now be in forgetting the personal venom stirred up along the line, and work for the good of Kalamazoo, and her people.

"The truth will prevail and the part played by all the leading actors in the grand jury investigation will be given its proper importance and its real motive and inspiration."

February 9, 1914, the circuit judge issued an order directing Mr. Dingley to show cause on the 16th day of February, 1914, why he should not be punished for a criminal contempt of said court, because of said publication. Attached to said order to show cause were certain affidavits. The record does not show the date of the service of the order to show cause. On February 16, 1914, the respondent appeared in person, and by his attorney, filed a sworn answer to the order to show cause, and entered a plea of not guilty.

Among other things the record discloses the following:

"STATE OF MICHIGAN.

"THE CIRCUIT COURT FOR THE COUNTY OF
KALAMAZOO.

"In the Matter of Edward N. Dingley, Relator
(Contempt Proceedings).

"Chas. W. Nichols appeared for the court.

"Joseph Hooper for the relator.

"Answer filed and relator pleaded not guilty."

* * * * *

"*The Court:* I understand, Mr. Hooper, that you do not deny the fact that your client, Mr. Dingley, published the article that he is charged with; in fact you conceded that in your answer?

"*Mr. Hooper:* Yes, sir; that is admitted.

"*The Court:* Now if you have any proof, as to the accuracy of the publication, to offer this morning you can put it on the witness stand; otherwise I will proceed at once.

"*Mr. Hooper:* It would be an absolute impossibility to present proof here this morning that we should be allowed to present. It is wholly out of the question, and we request the court, as a right, to be given such reasonable opportunity under the circumstances as appears necessary for us to prepare a defense and argue the law of the matter.

"The Court: Under your plea and confession we will proceed. You speak for your client, do you?

"Mr. Hooper: Yes, sir.

"The Court: Mr. Nichols, I wish you would show the gentlemen those two letters and see if they recognize them as having come from him or his client. [Mr. Nichols here handed Mr. Hooper two letters.]

"Mr. Hooper: Mr. Dingley says he had nothing to do with the sending of these letters, and as far as I am concerned I certainly had nothing to do with it.

"The Court: I don't think you did, Mr. Hooper; ask your client if he did not publish that in his paper then.

"Mr. Hooper: I don't think I will ask my client that, that has not been brought to the attention of the court as a contempt proceedings here."

Against the objection of counsel the letters were read into the record, when the following occurred:

"The Court: Mr. Dingley, you may stand up.

"Mr. Hooper: I do not wish to interrupt the proceedings at all—

"The Court: I do not intend you shall.

"Mr. Hooper: May I ask the Court?

"The Court: Yes, sir.

"Mr. Hooper: Is the respondent to be sentenced without an opportunity upon my part to do anything for him? I have only been called into the matter recently.

"The Court: You have already by your plea admitted it, and I have already made a ruling; you confess to having published the article that you are charged with having published. This is the whole proposition. This is a criminal contempt proceeding. I have overruled—if you didn't understand it before you understand it now—your objections to that proposition. Mr. Dingley, you have heard those articles, have you?

"Mr. Dingley: Yes, sir.

"The Court: The first one read was taken from your paper, was it not?

"Mr. Dingley: Yes, sir; it was.

"The Court: You stand before the court now charged with contempt of court in publishing an article a week ago last Saturday that the court at any

rate concludes was in contempt of the court, and sought to bring this court into contempt of the people.

"Mr. Dingley: My attorney—

"The Court: Never mind your attorney, listen to me, I have nothing to do or say to you except so far as it pertains to your action as relates to the court. Myself personally and individually is of no importance. I would be glad to deal with you in another way, but I cannot bring any personal matter as far as it relates to the court. I understand you as many others do. Without any desire to inflict unnecessary punishment on you I propose to give you an opportunity, and that is this: While you richly deserve the full punishment provided by the statute for what you have done because you have taken advantage in every way, you have done what no good citizen would do, you have done what no good American would do, I am going to give you an opportunity before passing sentence to make some amends. I will adjourn this matter for one week from today, and what the court will do at that time will depend entirely upon what you do.

"Mr. Hooper: May I ask the court, am I to understand the court finds the respondent guilty of contempt charged?

"The Court: Yes, sir; I shall defer sentence one week from today, and it will depend entirely upon the action of the respondent as to what the court does."

The record contains other matter which it is not necessary to reproduce here.

Later the court pronounced judgment as follows:

"The judgment of the court here is that you pay a fine of \$200—and the court will give you 48 hours within which to pay it—or stand committed to the county jail until such fine is paid, not to exceed 30 days. You may have 48 hours within which to raise it or take an appeal.

"Mr. Hooper: May I ask an exception to the judgment of the court?

"The Court: Yes, you may."

In his return to the writ of certiorari made by the circuit judge appears the following:

"(5) That said Edward N. Dingley filed his answer in writing which was read in open court, and a true copy of same is attached to the petition upon which said writ of certiorari was allowed, and is marked as 'Exhibit F.'

"(6) That in and by said answer a demand was made that interrogatories be filed, and the issue tried by a jury, which demands were denied and overruled by the court.

"(7) That the attorney for said Edward N. Dingley then prayed the court to continue and adjourn the proceedings until some day certain, to enable him to secure the attendance of witnesses and present proof, which prayer the court denied because, in the judgment of the court, the petitioner, who admitted the publication by him of the alleged contemptuous article, ought to be prepared to establish the truth thereof, or refrain from publishing the same, and because he had been allowed by the said order to show cause a reasonable time in which to prepare for the presentation of any proofs he desired to introduce, and because no showing under oath was made as a basis for said application; that the said Edward N. Dingley was then given an opportunity to produce any proofs or witnesses he had before the court at once, and, declining to do so, was adjudicated to be guilty of the contempt alleged as against him, and judgment to that end was thereafter entered upon the journal of the court."

Many interesting questions are presented and discussed by counsel, which we think it unnecessary to discuss here.

The right of the court to punish as for a criminal contempt an offender is no longer an open question in this State. The power is conferred by statute (1 Comp. Laws, § 1098; 5 How. Stat. [2d Ed.] § 12589). The courts possess the power independent of the statute. *Langdon v. Wayne Circuit Judges*, 76 Mich. 358 (43 N. W. 310); *In re Chadwick*, 109 Mich. 588 (67 N. W. 1071); *Nichols v. Judge of Superior Court*, 130 Mich. 187 (89 N. W. 691), and the many authorities therein cited. These cases are also authority

for the proposition that the issue is one for the court and not one for a jury.

An argument is made upon the part of the relator to excuse the publication of the article because it was aimed at Mr. Stewart as a private person, and not as circuit judge. We have no hesitancy in saying that the publication of the article, unless it is true, is in contempt of court and deserves punishment. We have already said that when an alleged offender has pleaded not guilty, the issue is to be tried by the court and not by a jury. It does not follow from this that it must be tried by the judge who is criticised. If the offense is committed in the presence of the judge, it would seem to follow that he should deal with the offender. While he doubtless has the legal right to proceed where the offense is not committed before him, we think it a better practice, as was done in *Re Chadwick, supra*, to call in another judge.

While we think Mr. Dingley should be punished, if he cannot purge himself of contempt by showing the truth of the publication, much as we dislike to interfere with the order of a court in proceedings of this nature, we cannot approve of the haste which characterized this proceeding. One of the earliest maxims with which the student of the law becomes familiar is that every alleged offender is entitled to his day in court before he is condemned. We quote from *Ferry v. Wheel Co.*, 71 Vt. 457 (45 Atl. 1035, 76 Am. St. Rep. 787):

"It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered."

This maxim was not observed, and for that reason the judgment of the court must be set aside and the proceeding dismissed without prejudice to the right to commence over again.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

KRAUS v. HANSEN.

1. SALES — CONTRACTS — MEETING OF MINDS — OFFER AND ACCEPTANCE.

Where plaintiff wrote to defendant, in response to a request for an offer for a quantity of potatoes, that defendant might ship one car of medium size, round, white Michigan potatoes, \$1.05 "your track," "potatoes to be sacked in 150 pound sacks, providing man accompanies car if weather remains cold and heat same, as we will not run any risk of potatoes being frosted," and if satisfactory plaintiff would take two more; where plaintiff telegraphed further, "Potatoes * * * must be in 150 pound sacks. Wire us if you cannot get sacks, we will express them. Must have one car this week, balance next week;" repeating the instructions as to quality, etc., and where defendant replied, "Cannot ship until I get cars. Also, I haven't got sacks, as you know, over phone. Will try and ship this or next week if I can get cars," plaintiff writing that he had arranged to have the railroad company send cars and was forwarding sacks, there was no contract, because the minds of plaintiff and defendant did not meet as to the risk of freezing, or the sending of a man in the car.

2. FRAUDS, STATUTE OF—TELEPHONE—ORAL ACCEPTANCE.

Where the parties to an alleged sale of potatoes did not include in their written correspondence sufficient evidence

of the terms of their agreement to satisfy the statute of frauds, a later communication by telephone could not be relied upon as a sufficient acceptance of the terms proposed in their letters, so as to satisfy the statute of frauds.

Error to Montcalm; Davis, J. Submitted June 22, 1914. (Docket No. 70.) Decided July 24, 1914.

Assumpsit by Edward N. Kraus against John Hansen for breach of a contract for the sale of three carloads of potatoes. Judgment for plaintiff. Defendant brings error. Reversed; new trial refused.

Frank A. Miller (N. O. Griswold, of counsel), for appellant.

J. W. Dasef, for appellee.

OSTRANDER, J. The defendant, who traded as Hansen's Department Store, at Edmore, Mich., wrote and mailed to plaintiff, trading as E. N. Kraus & Co., at Toledo, Ohio, a postal card:

"EDMORE, MICHIGAN, 3/2/12.

"*Dear Sir:*

"Your name was given to me by Jake Lichtenauer, of Greenville. I have at present three carloads of good, first-class white potatoes on my hands and I am going to sell them as soon as cars can be placed next week I expect. What can you give here."

Plaintiff wrote defendant in reply:

"TOLEDO, OHIO, March 4th, 1912.

"HANSEN'S DEPARTMENT STORE,

"Edmore, Mich.

"*Gentlemen:*

"You may ship us one car medium size, round white Michigan potatoes, \$1.05 your track; potatoes to be sacked in 150-pound sacks, providing man accompanies car if weather remains cold and heat same, as we will not run any risk of potatoes being frosted and man must accompany car with stove. If this car proves satisfactory, we would be willing to buy the other two you have. Wire if you accept."

And later sent a night letter by wire, reading:

"March 6th, 1912, TOLEDO, OHIO.

"HANSEN'S DEPARTMENT STORE,

"Edmore, Michigan.

"Potatoes you are shipping us must be in 150-pound sacks. Wire us if you cannot get sacks we will express them. Must have one car this week, balance next week. Send only good stock, medium size round white potatoes free from frost. Stove and man in cars.

"E. N. KRAUS & Co."

A postal card from defendant to plaintiff, reading:

"EDMORE, MICHIGAN, 3/7/12.

"*Dear Sirs:*

"Your telegram at hand and noted. Cannot ship until I get cars. Also I haven't got sacks as you know over the phone. Will try and ship this or next week if I can get cars.

"Yours truly,

"JOHN HANSEN,

"HANSEN'S DEPARTMENT STORE."

—and the reply:

"TOLEDO, OHIO, 3/12/12.

"HANSEN'S DEPARTMENT STORE,

"Edmore, Mich.

"*Gentlemen:*

"We have arranged with the P. M. to send you cars to load our potatoes in; you should have one at hand tomorrow morning. Are sending you 200 sacks and together with the 50 you have on hand will be enough to sack one car. As soon as loaded rush down to us and wire us and we will send enough sacks to sack the other cars.

"Very truly yours,

"E. N. KRAUS & Co."

—completed the written correspondence. Defendant sent no potatoes, and plaintiff supplied himself as he could. Potatoes of the quality described were scarce and advanced in price, and plaintiff paid from \$1.20 to \$1.22 per bushel for them in car load lots. A car load of potatoes, sacked, contains 625 bushels or more.

Plaintiff forwarded to defendant sacks for one car load, and was prepared to forward sacks for further shipments. It does not appear that defendant was furnished a car or cars in which to ship the potatoes.

Plaintiff sued for damages for breach of a contract to deliver to him at Edmore, free on board cars, three car loads of potatoes at \$1.05 per bushel. Upon the trial, he was permitted, over objection, to introduce testimony which tended to prove the following facts: Upon receiving the card first written by defendant, plaintiff called defendant by telephone, and in the conversation arranged and bargained with defendant for one car of potatoes at \$1.05 per bushel, to be shipped immediately; if the quality of potatoes delivered was as represented, then for two other cars, all to be in 150-pound sacks; that his letter of March 4, 1912, was confirmatory of the oral bargain. After sending the letter, defendant called plaintiff on the telephone, and insisted that he take three cars of potatoes, to which plaintiff consented and agreed to take three car loads and confirmed the arrangement by his night message of March 6th. Defendant agreed that plaintiff should buy sacks, the cost of them to be deducted from the account for potatoes. Later, in a conversation by telephone, defendant said he could get no cars. Plaintiff then asked the railroad company to furnish cars, or a car. Receiving no potatoes, plaintiff again, about March 15th, talked with defendant by telephone, who told him that the market had advanced, his attorney had advised him: he need not ship the potatoes, and that plaintiff would not get them. Recalled, after defendant had rested his case, plaintiff testified:

"There was no talk between myself and Hansen at any time in reference to shipping the potatoes in refrigerator cars. That is the reason I wanted a stove put in. I told him I would pay for that part of it if he would have a stove in. I knew it was impossible

to get a refrigerator car, but you could get plenty of box cars. I would have been willing to receive the potatoes in box cars. * * *

Cross-examination:

"Q. When you wrote those letters of March 4th and March 12th, etc., you meant everything you said in them, didn't you?

"A. I suppose so.

"Q. You didn't say anything for his amusement or your own, but what you meant, did you?

"A. No.

"Q. What did you mean by this, 'Will not run any risk of potatoes being frosted'?"

"A. I have said previous to that, in a car with a stove; and I was to pay for it. That is why I wanted him to be sure and do that.

"Q. Then when you bought the potatoes you meant that you were not buying them at Edmore on board cars, but they must be delivered to you in Toledo free from frost, didn't you?

"A. I didn't say so.

"Q. If you bought them at Edmore, you would have to put your own man in the car?

"A. Well, he was to get a man at my expense, so he was virtually my man.

"Q. Where did you say anything about 'at your expense' in these letters?

"A. It was on the telephone."

Defendant offered testimony tending to contradict in many material matters that produced by plaintiff. He denies that in the telephone conversation he agreed to put a man and a stove in a car under any circumstances, but did say he would put in an order for a refrigerator car, and did so, but no refrigerator car was ever furnished him, and he got none until May. He sold the potatoes for \$1.08 to a buyer, who secured refrigerator cars for shipment. His version of the last telephone conversation is:

"At the second conversation, in Grand Rapids, I was in Mr. Hilding's office when the call came in for me, and he said he was Kraus & Co., and wanted to

know when I was going to ship them potatoes. I said, 'I haven't got any cars yet.' He said, 'We must have them potatoes.' I says, 'I haven't got any cars; how can I ship them, ship them in open box cars?' He says, 'Ship them in open box cars.' I says, 'It is snowing, and I don't dare ship these potatoes in open box cars; I don't dare ship them in open box cars unless you wire me money in advance; I will not ship them unless you wire me money in advance.' I did not say to him at that time that potatoes had come up, and I was not going to ship them. I says, 'I am down here on a lawsuit, a man owes me a small account, and I am trying to collect it; when I get home, if he has cars there—although those two weeks' contract has expired—if there is a car there I will still load a car for you.' That is what I told him. I was not able to get a car when I got home."

And again:

"He said, 'Are you shipping those potatoes?' And I says, 'I cannot get cars.' He says, 'Put them in box cars.' I says, 'Snowing here; if you will guarantee the purchase, send the money in advance, when I get home—this is the last day on the contract, last day on the two cars they said they must have—and if the cars are there when I get home, if the car is there I think I said, when I get home I will fill it for you at that.'"

The court instructed the jury that the whole controversy hinged "absolutely and entirely" on the conversation over the telephone with Hansen at Grand Rapids; that under the undisputed testimony there was a contract made for the sale of three car loads of potatoes. Calling attention to the original postal card sent by defendant to plaintiff and the written reply thereto, the court said:

"Up to that point there was an absolute bargain made for one car at \$1.05 f. o. b. Edmore. No terms had been arranged for as to payment, so of course it would be due at the time of shipment if the other party so demanded."

It is obvious that the two writings referred to do

not make a contract for one car load of potatoes. There was no written acceptance by plaintiff of the written offer of defendant. On the contrary, a counter proposition was made. Besides which, the court had admitted testimony which, if believed, established that the first written communication of plaintiff was confirmatory of a bargain not proposed by defendant in his first written communication, but arranged by telephone. There is lacking, also, written acceptance by defendant of plaintiff's counter offer. The court proceeded:

"Later further correspondence passed between the parties in which the court finds that a contract was made for the other two cars also, so that it was then contemplated three cars would be shipped by Hansen to this man as soon as Hansen could get cars to ship them, and if he could get cars to ship them. It was a contract to deliver those three cars of potatoes on the part of Hansen, providing he could get cars to ship them, without naming the time except as he agreed in his correspondence to send them if he could. Under Hansen's offer he was to have done it within a reasonable time. * * * Up to this point now, up to the time of the last night telegram, up to the time before they had the telephone communication at Grand Rapids, the duty of Hansen was to send those potatoes."

I assume that the term "correspondence," used by the court, meant both the written and oral communications. Proceeding, the jury was further instructed, in substance and effect, that, if the last telephone conversation occurred as plaintiff testified, and was as he testified, plaintiff should recover, but if they believed defendant with reference to that conversation, plaintiff could not recover, the reason given being that if defendant upon that occasion refused unqualifiedly to deliver the potatoes, he waived performance by plaintiff of the duty to furnish cars. I find nothing in the written memoranda indicating that either party accepted, unconditionally, any proposal made by the

other. For example, where does it appear that plaintiff accepted the risk of the potatoes being frozen in transit? Or that defendant undertook to send a man and stove in the cars? Or that plaintiff was to pay the expense of a man to travel with the cars and keep a fire? How can the terms of the contract which plaintiff says was made be discovered without the aid of parol testimony? The testimony which was received does not merely explain the writings, but is relied upon to prove, what the writings do not prove, that at some time an oral proposition was accepted as made. When the testimony is considered, the wisdom of the statute of frauds is exemplified. If there was no existing contract when the last conversation by telephone occurred, no breach of contract grew out of that conversation. If a bargain was made during that conversation, it was one resting in parol.

It was therefore error to instruct the jury that a contract for three car loads of potatoes had been established. The judgment is reversed; and, as the court should have directed a verdict for defendant, no new trial is awarded.

MCALVAY, C. J., and BROOKE, KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

PEOPLE v. MACOMBER.

APPEAL AND ERROR—CRIMINAL LAW—EXCEPTIONS BEFORE SENTENCE—JUDGMENT, NECESSITY FOR.

A judgment is necessary in a criminal as well as in a civil suit to sustain the issuance of a writ of error. If a respondent, convicted of crime, desires to review the case

on exceptions before sentence, the proceeding, being statutory, should conform to the statute.

Error to Calhoun; North, J. Submitted June 12, 1914. (Docket No. 98.) Decided July 24, 1914.

Charles Macomber was convicted of violating the liquor law. Dismissed.

Robert H. Kirschman, Prosecuting Attorney, for the people.

Joseph L. Hooper, for respondent.

PER CURIAM. Neither the printed record nor the return in the office of the clerk of this court shows that a judgment has been entered in this cause. The return shows, but the printed record does not, a stay of proceedings for 60 days, a period which expired more than a year ago. The record indicates that a writ of error was sued out, a bill of exceptions settled, containing—though for what reason we cannot discover—the substance of all the testimony given upon the trial, and errors are assigned. The writ performs no function; there appearing to be no judgment to affirm or reverse. Whether there will ever be a judgment we cannot know. We dismiss the case, directing the attention of counsel to the applicable statutes and to the decisions in *People v. West*, 143 Mich. 586 (107 N. W. 283); *People v. Fritch*, 161 Mich. 111 (125 N. W. 785), and to earlier decisions. If persons convicted of crime desire to review the action of the trial court before sentence, they should bring themselves within the statute allowing such proceeding. This the respondent has not done.

Cause dismissed.

ABBOTT v. WAYNE CIRCUIT JUDGE.

FIELD v. WAYNE CIRCUIT JUDGE.

1. RECEIVERS — EQUITY PRACTICE — ABATEMENT — SUIT PENDING — DISSOLUTION OF CORPORATIONS.

After the appointment of a receiver, in a suit instituted by the relator as majority stockholder and officer to dissolve a construction company, and after a sale of the assets of the defendant corporation named in the bill of complaint had been ordered by the court upon the intervention of a number of creditors who asked for such sale of the property, and while other proceedings were pending in the principal case, relator filed a bill of complaint charging the receiver with bad faith and neglect of duty and asking that the suit be consolidated with the other proceedings pending. No leave to commence suit was obtained from the court which had appointed the receiver. On motion of the receiver the bill was stricken from the files of the court on the ground that it could not be filed without leave of the court and that it unwarrantably interfered with the proceedings pending. *Held*, that the action of the lower court would not be set aside in mandamus, and that no duty was shown requiring the court to grant permission to institute the second suit in chancery.

2. SAME—CORPORATIONS—WINDING UP.

Also, the lower court was not required to permit the relator to file an answer in behalf of the defendant corporation in the supplementary proceedings in which the creditors of the construction company had petitioned for dissolution, where the corporation had appeared by its solicitors and filed an answer, and where it was not shown that the answer was corruptly prepared or that the solicitors were unauthorized or were acting in bad faith.

3. SAME—APPEAL AND ERROR—STOCK AND STOCKHOLDERS.

But an order of dissolution and sale of the assets of defendant was a final order from which stockholders that showed cause why the corporation should not be dissolved could take an appeal, although the order was entered in

the proceedings for intervention by its creditors, instead of being made in the proceeding for voluntary dissolution. 3 Comp: Laws, § 10890; 5 How. Stat. (2d Ed.) § 13598.

Mandamus by Charles S. Abbott against Henry A. Mandell, one of the circuit judges for the county of Wayne, to require respondent to set aside an order striking from the files of the court a bill of complaint filed by said Abbott as complainant against H. W. Noble & Company and a number of other defendants.

Also, mandamus by the same relator against Philip T. Van Zile, Wayne circuit judge, to vacate an order appointing a receiver for the Chippewa Construction Company, in voluntary proceedings for dissolution of said company, also, to vacate an order denying relator the right to appeal as one of the stockholders of said defendant from an order of sale of its assets.

Abbott & Abbott (Selling & Brand, of counsel), for relator.

Corliss, Leete & Moody, Angell, Boynton, McMillan, Bodman & Turner, Tolles, Hogsett, Ginn & Morley, Chapman, McNamara & Matthews, and Chamberlain, May, Denby & Webster (Orla B. Taylor and R. S. Holbrook, of counsel), for respondent.

Proceedings in mandamus by Clark C. Field against Philip T. Van Zile, one of the circuit judges for the county of Wayne, to require the respondent to vacate an order striking from the files the claim of appeal of relator from an order in chancery dissolving the Chippewa Construction Company and directing a sale of its assets, and for other relief.

Moore & Moore, for relator.

Angell, Boynton, McMillan, Bodman & Turner (R. S. Holbrook and Tolles, Hogsett, Ginn & Morley, of counsel), for respondent.

Submitted June 9, 1914. (Calendar Nos. 26,045, 26,046, 26,055.) Writ granted in second and third proceedings above named July 24, 1914.

OSTRANDER, J. The proceeding first above entitled is an application for a writ of mandamus requiring the respondent to set aside an order striking from the files a bill of complaint filed by relator as complainant against a large number of persons, firms, and corporations as defendants, to grant relator certain temporary injunctive relief, and to consolidate petitioner's said suit and certain causes and proceedings pending in said court.

In the proceeding second above entitled relator asks for a writ of mandamus requiring the respondent to set aside an order appointing a permanent receiver for the Chippewa Construction Company, an order striking from the files relator's claim of appeal from the order appointing a receiver, and an order directing a sale of the assets of the Chippewa Construction Company.

The proceeding third above entitled is an application for a writ of mandamus to set aside an order striking from the files relator's claim of appeal from an order (the same order heretofore mentioned) directing a sale of the property of the Chippewa Construction Company, to set aside an order striking from the files relator's claim of appeal from an order appointing a receiver for and sequestering the property of the Chippewa Construction Company, and to vacate and set aside a restraining order by which relator is enjoined from taking further proceedings in connection with his claim of appeal.

Eighteen printed briefs have been filed. The merits of the contentions are not before us, and yet three printed records of considerable proportions contain the matter brought up, which is arranged, if arrangement was attempted at all, without regard to

the order of events and in such a way as to make an examination of it very laborious.

At some time (I have not found the precise date of the transactions, but probably in the year 1911) two corporations were organized under the laws of this State; one the Consolidated Light & Power Company; the other the Chippewa Construction Company. The capital stock of the Consolidated Light & Power Company was \$100,000, the shares of stock being 10,000 in number, the announced purpose being the production and supplying of gas and electricity for lighting, fuel, and other purposes, the subscribers to the capital stock being J. L. Hudson 6,500 shares, F. R. Poss 1,500 shares, R. B. Tannahill 1,000 shares, C. S. Abbott 1,000 shares. A predecessor of this company had acquired certain rights, franchises, and options in connection with the development of a water power on the Chippewa river, and the principal purpose of the above-mentioned corporation was to secure the development of, and to manage and control the sale of, power from works to be established on said river and at other points. The Chippewa Construction Company was organized for development and construction work incident to the general project. Its capital stock was \$10,000. Some time in the year 1912, I assume in the month of October, there were filed in the circuit court for the county of Wayne, in chancery, verified petitions for the dissolution of each of these corporations, each of them being signed by Charles S. Abbott, one of the above-named relators, by Robert B. Tannahill and by Frank R. Poss. The petition for the dissolution of the Consolidated Light & Power Company set out, among other things, that the president of the company had deceased, and his successor had not yet accepted office; that Charles S. Abbott was vice president and Robert B. Tannahill secretary and treasurer of the corporation, and, with

Frank R. Poss, constituted the board of directors; that the corporation had partially prosecuted the design upon which it started, "but now finds itself unable to command the necessary additional capital to fully carry out its plans so as to render the project a complete success, and from a considerable part of its property it is unable to obtain revenue because of its inability to develop other property necessary to be used in connection therewith;" that it was engaged in the manufacture and distribution and sale of electricity in a considerable territory, was entirely solvent, with abundant assets to settle all of its obligations; that its total assets exceeded in value \$800,000, while its liabilities were about \$518,000.

"The assets, however, are of a character which necessarily make their fair realization depend largely upon the continuation of the business and the further development of the enterprise undertaken.

"*Fifth.* Your petitioners further show that they have been in consultation with some of the largest creditors of the company, and have frankly and freely disclosed to them the condition of the affairs of the company, and have asked their advice, and that it is the advice of such creditors that it is for the best interests of all concerned that, under the circumstances, the corporation be dissolved and placed in the hands of a receiver and the business continued under the provisions of law for the purposes mentioned herein.

"*Sixth.* Your petitioners believe and respectfully represent to the court for the reasons herein stated that they deem it beneficial to the stockholders of said corporation that said corporation should be dissolved under the provisions of chapter 300 of the Compiled Laws of the State of Michigan of the year 1897 as amended, so that its assets may be worked out without unnecessary waste or delay for the benefit of the creditors and stockholders. And your petitioners know and positively aver that to shut down the plants of the company and stop its business would be doing the creditors and the stockholders an irreparable injury.

"Your petitioners fear that the filing of this petition and the publication of the order to show cause why said corporation should not be dissolved will very seriously embarrass, if not entirely stop, the carrying on of business and result in the shutting up of the plants of the company unless a temporary receiver shall be appointed by this court pending the hearing upon the dissolution of said corporation and the appointment of a statutory receiver; that it is the desire of your petitioners, as directors of said corporation, and also as stockholders holding a majority of the stock thereof and of creditors holding a large part of the indebtedness of said corporation, that a receiver be appointed for said company for the purpose of preserving its assets and good will and continuing the operations of said company as a going concern so as to secure the payment of all debts in full and a fair return to the stockholders therein."

Attached to the petition were schedules with descriptions of property and valuations, a list of stockholders with the holdings, in which relator Abbott appears as holder of 5,000 shares, from which it further appears that all of the property of the company is subject to a mortgage dated November 4, 1911, to the Detroit Trust Company, trustee, to secure an authorized issue of \$2,000,000 30-year 6 per cent. bonds, of which \$264,000 had been issued; that the F. Bissell Company, of Toledo, Ohio, was entitled to the net revenues collected by the corporation in the cities of Gladwin, Coleman, and Alma, and the villages of Rosebush and Shepherd. The list of direct claims against the company is not footed in the record, but it appears from it that a considerable number of creditors exist, among them the Chippewa Construction Company, which it owed upon open account \$247,399.63.

As above stated, a similar petition for the dissolution of the Chippewa Construction Company was filed, relator Abbott claiming to be holder of 55 per cent. of the stock of that company.

After the filing of these petitions in the matter of the Chippewa Construction Company, and, I assume, in the matter of the Consolidated Light & Power Company, orders were entered October 29, 1912, appointing the Detroit Trust Company temporary receiver, and orders to show cause, before a commissioner, why the corporations should not be dissolved were made, returnable February 3, 1913. The orders to show cause were directed to all persons interested in the corporations. It was further ordered that a copy of the order be published for three weeks, once each week, in a newspaper published in Wayne county. The order appointing a receiver for the Chippewa Construction Company recites matters set out in the petitions, with the finding that:

"It appearing to the court that, pending the hearing of the order to show cause issued upon said petition, it is necessary for the preservation of the assets of the company and the protection of the interests of creditors and stockholders that a temporary receiver be appointed as asked for in said petition."

The receiver is ordered to take possession of all property, collect outstanding bills and accounts, conduct the business as a going concern to such an extent as it may deem advisable, and for that purpose buy materials and incur other expenses, sell and dispose of perishable property, make an inventory and appraisal of assets and statement of claims and demands against the company, and report the same to the court. It is given leave to borrow or advance a sum not exceeding \$10,000, and repay it, with interest, out of moneys coming into its hands. In each case the corporation, its officers and agents, are ordered to deliver to the receiver possession of all property and effects. In this way the relator Abbott sought and obtained the intervention of a court of equity in the affairs of these concerns, asking that they be dissolved. Various orders were made at the instance of

the receiver. December 27, 1912, a petition was filed by an attorney for 62 laborers, asking leave to levy execution on the property of the construction company. It was noticed for January 2, 1913, and on that day was continued to January 11th. On January 11th the receiver asked for leave to issue \$21,000 of receiver's certificates to pay labor claims, etc. Upon this petition Judge Codd made an order to show cause and an order requiring proof of labor claims. Without reciting in detail the proceedings, it appears that on January 25th a summary inventory and appraisal was filed, and the petition for leave to issue receiver's certificates was heard and granted.

On January 28, 1913, relator Abbott, claiming to be a majority stockholder of both of said corporations, filed identical petitions in the respective proceedings for dissolution, praying for a six-months postponement of hearing upon the orders to show cause for the purpose of further opportunity to obtain funds to complete and put into operation a certain dam. These petitions were denied February 1, 1913, after a hearing by Judge Codd. March 5, 1913, two persons, representing that they were judgment creditors of the Chippewa Construction Company and that executions to collect the judgment had been returned unsatisfied, asked for leave to intervene in the proceedings for dissolution in behalf of themselves and other creditors. On the same day an order was entered granting them leave to intervene, and that upon such intervention process issue requiring the Chippewa Construction Company to appear and answer the interveners' petition. The bill filed by these creditors charged that they had recovered judgments in justice's court, respectively, for \$106.05 damages and \$3.85 costs, and for \$97.20 damages and costs, had caused executions to be issued to collect the same, placed them in the hands of the sheriff, and they had been returned unsatisfied and the judgments remain-

ed unpaid; that the judgments were for labor claims, and that there were other judgments against the Chippewa Construction Company for labor performed for it, aggregating \$2,000, upon some of which executions had been issued and not returned; that (upon information and belief) there were other claims for labor against the said corporation amounting to \$10,000. Various facts, necessary to be set out in a judgment creditor's bill, are charged, with the fact that the court had possession through its receiver of the assets of the corporation. The prayer of the bill was that it might be treated as an intervening petition in the proceedings to dissolve the corporation, that the court sequester the stock, property, things in action, and effects of said corporation, and apply the same to the payment of the indebtedness due complainants and other creditors; that a receiver be appointed, etc., etc.

By its secretary and treasurer the defendant Chippewa Construction Company answered the bill, admitting most of the charges therein. This answer was filed March 13, 1913. Later, March 29, 1913, a paper called a demurrer, entitled in the dissolution proceedings, was filed by relator Abbott as "one of the respondents in the above-entitled matter," who sets out his reasons for refusing to the said judgment creditors the right to intervene in the said dissolution proceeding. On the same day that it was filed relator Abbott filed a personal answer in the matter of the dissolution proceedings, setting out that the Chippewa Construction Company ought not to be dissolved because:

(1) It is not insolvent; (2) a dissolution would not benefit stockholders; (3) would be injurious to stockholders; (4) would not benefit creditors; and (5) would injure creditors; (6) would be injurious to the public interest, etc., etc.

March 22, 1913, relators Abbott and Field filed a paper in the proceedings for the dissolution of the

Chippewa Construction Company purporting to be the answer of the company and of Abbott and Field individually. The answer of Abbott and Field for themselves and (purporting also to be) for the Chippewa Construction Company was on motion stricken from the files, because they (Abbott and Field) had not obtained leave to appear in the cause as stockholders and answer the bill. Abbott thereupon, in open court, asked for leave to intervene and refile said answer, which the court denied, for the reason that intervention and answer on behalf of stockholders in the matter of intervening judgment creditors would be irregular and unnecessary, and that the answer presented consisted "largely of matters impertinent and in no way relevant to the issue upon such judgment creditor's bill." March 29, 1913, an order was entered appointing the Detroit Trust Company (the receiver appointed in the proceedings to dissolve the corporations) receiver in the intervening judgment creditor's proceeding and sequestering the property of the Chippewa Construction Company, with leave to all creditors to appear and present claims and become parties to the proceeding. From this order, on May 6, 1913, relator Abbott filed a claim of appeal. A claim of appeal was also filed on behalf of relator Clark C. Field, and both were stricken from the files.

The orders to show cause why the corporations should not be dissolved were returnable February 3, 1913. There were various appearances on that day, and, upon the request of the solicitor for relator Abbott, the hearing was adjourned to February 7, 1913, when the taking of testimony was begun in behalf of relator Abbott, and was continued from time to time; the last testimony in his behalf and in behalf of relator Field being taken April 11, 1913. No one else desiring to show cause, the proofs in their behalf were declared closed. An adjournment was taken to April 22, 1913. No further testimony was taken, although

hearings were continued from time to time until January 31, 1914. It does not appear that the testimony taken has been reported to the court or that the court has made any order dissolving or refusing to dissolve either of said corporations.

Under date September 15, 1913, the intervening judgment creditors of the Chippewa Construction Company filed a petition asking for an order directing the receiver to sell the assets of that company at public auction and to apply the proceeds: First, to pay the expenses of administration; second, to pay all labor claims in full, with interest; third, to divide the remainder among all general creditors of the corporation. The receiver answered this petition and represented that the labor claims filed with the receiver amounted to \$12,885, in addition to one for \$8,000 filed by one Townsend; that other claims against the corporation, secured and unsecured, amounted to \$475,000 and upwards; that by direction of the court the receiver had sold certain personal property of the corporation, receiving therefor \$1,824.21, and had been unable to make further sales; that the issue of receiver's certificates authorized by the court found no market; that the National Pole Company on September 3, 1913, filed its bill as a judgment creditor of the Consolidated Light & Power Company, and that by decree of the court (Wayne county circuit court, in chancery) the property of that corporation had been sequestered and the Detroit Trust Company appointed receiver thereof; that the two corporations named were engaged in a common project, and the value of the assets of each depended to a large extent upon connection with the assets of the other; and that a sale of the assets of both should be made so that both properties might be secured by the same bidders. On November 12, 1913, an order was entered for a sale of the assets of the Chippewa Construction Company to be made January 13, 1914.

November 13, 1913, relator Abbott filed the sworn bill of complaint hereinbefore mentioned. Among the numerous parties made defendants therein is the Detroit Trust Company, and it is charged that, as receiver of the said corporations, it had been derelict in performing its duty, and has acted in bad faith as such receiver. The Detroit Trust Company moved to quash the process issued when the bill was filed and to strike the bill from the files for the reasons:

(1) That it was filed against it in its capacity as receiver without leave of the court; (2) bringing the said bill against it as receiver amounted to an unwarranted interference with the orderly administration of justice by said court in a suit pending therein and described in said bill, and was in contempt of the court.

Two other similar motions were made by the Detroit Trust Company, and, coming on to be heard before Judge Mandell, were granted.

What has been so far disclosed is a small part only of the matter which has been brought upon the record. Relator Abbott, as codefendant with the Williamston Illuminating Company, has been sued, a judgment recovered, his stock in the two corporations involved in this proceeding has been taken on execution and sold at public auction. The return of the sheriff of Wayne county to this effect was made June 13, 1913. Relator Abbott's rights as stockholder in either corporation—at least the nature and extent of his rights—are questioned in another proceeding. It is true that Abbott questions the conclusiveness of the sale of his stock and asserts that he had notice neither of the levy nor the sale.

It is made to appear that after filing the petitions for dissolution of the corporations, and on April 14, 1913, relators Abbott and Field filed a bill in chancery in the Wayne circuit court against the executors of the estate of J. L. Hudson and others, in which

suit it was denied by the defendants that Abbott was holder of stock in said corporations to the amount he claimed. There is pending in the same court a suit in which Abbott and other stockholders of said corporations are defendants, in which is involved the right of relator to the stock held by him in said corporations.

The bill of complaint which was filed by relator Abbott and was stricken from the files, treated as a pleading, is unique. It purports to be a history of his connection with, and efforts in behalf of, the corporations involved, and the manner in which, and the methods by which, his efforts to secure a successful existence for them have been thwarted by the persons, firms, and corporations with whom he has dealt or has sought to deal. It is a tale of perfidy and of conspiracy, of which he is the victim. He asks that all of the proceedings begun by him and by others in relation to said corporations and those involving his ownership of stock in them be consolidated and heard together; that much that has been done be undone; and that the court shall manage in some way to pay the debts and secure the continued existence of the said corporations to the end that his interest in them may be made of value. The corporations involved were insolvent, when petitions for their dissolution were filed, in that they were unable to pay their debts as they matured in the regular course of business. Being insolvent, and there being hope that financial aid might be secured if time was allowed, the aid of a court of equity was sought, not in good faith to dissolve, or not dissolve, the corporations as conditions should require, but to secure protection from the assaults of creditors whose demands were pressing. So much is manifest. It is true that relator Abbott now contends that he was forced, cajoled, or seduced into participation in the proceedings to dissolve, but he says that a bankruptcy proceeding was the alter-

native—a fact which is also manifest. Protected by the arm of the court, he still failed to secure the financial assistance required, mainly, he claims, on account of the bad faith and dishonest motives of all, or nearly all, of those whose interests were directly or indirectly involved, or whom he sought to interest. A receiver was seeking (though, he says, not in good faith) to conserve (or not to conserve) the property and continue the corporations in operation. A swarm of creditors, denied relief in the usual forums on account of the receivership, brought their grievances to the attention of the court whose officer the receiver was. They were permitted to intervene. We are not called upon to decide whether, in such a case as this one is, a court of equity may not dispose of the entire assets of a corporation at the instance of creditors who have intervened, without determining whether, otherwise, the corporation ought to be dissolved. Coming to the questions which are presented for decision, it does not appear to be the plain legal duty of the court below to permit relator Abbott to file his bill, upon which no relief can be granted without halting all proceedings directly or indirectly connected with the original proceeding instituted by relator Abbott, and re-examining all questions, or nearly all of them, heretofore determined. It is not the plain legal duty of the trial court to permit relator Abbott to file an answer in the original or supplemental proceeding for himself, for Field, and for the Chippewa Construction Company, there having been an answer put in by the Chippewa Construction Company, by its accredited solicitors, and it not being made to appear that the answer was corruptly filed or by persons not, in fact, the accredited representatives of the corporation. It is not the plain legal duty of the trial court to consider the demurrers and other pleadings of relators, in the original or the dependent creditors' proceedings. Neither relator has attempted, in either proceeding,

by motion, or by petition, to advise the court that he has a distinct interest to protect which he ought to be permitted to intervene. Nor is our attention directed to any document or pleading, produced to the court below, circumstantial and verified, which advises the court that the interests of stockholders generally, or of creditors, is jeopardized or affected by the conduct of persons, solicitors, or others representing interests upon the record.

But whether a stockholder of a corporation seeking voluntary dissolution, who has appeared and shown cause against dissolution, may not appeal from an order, entered in a dependent intervention proceeding, for the sale at auction of all of the assets of the corporation, is a different question. It is a final order. *Webber v. Randall*, 89 Mich. 531 (50 N. W. 877). It is entered in the dependent intervention proceeding, but nevertheless disposes of the assets of the corporation which initiated the original proceeding. The statute (3 Comp. Laws, § 10890; 5 How. Stat. [2d Ed.] § 13598 [a part of chapter 300]) provides that:

"Any corporation, person or persons claiming to be aggrieved by any decree or final order of any circuit court in chancery in any proceedings mentioned in this chapter, may appeal therefrom to the Supreme Court."

This express statute right of appeal, we think, should not be denied because the order appealed from was not strictly an order entered in the dissolution proceeding. It ends that proceeding when a sale is made and the proceeds of it are distributed.

We are of opinion that motions No. 122 and No. 123 should be granted.

MCALVAY, C. J., and BROOKE, KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

SMITH v. CITY NATIONAL BANK OF LANSING.

1. BANKS AND BANKING—LOST DRAFT—EVIDENCE.

In an action against a bank for money received for the use of plaintiff, evidence that the defendant was instructed to forward the amount received to an address given by plaintiff; that in accordance with the usual practice of the bank, an employee placed the draft in a letter which was placed among a number of others and tied into a bundle that was later deposited in the post office; that the envelope was addressed to plaintiff at the place mentioned in his instructions; that he was absent from that place on the day when the letter would probably have arrived, that the persons present at such time did not receive the letter and the draft had never been presented for payment to the drawee, *held*, to present an issue of fact for the jury as to the proper mailing of the draft.

2. SAME—EVIDENCE—LETTERS—BURDEN OF PROOF.

The burden of establishing the mailing of the draft was on the defendant.

3. SAME—COURSE OF MAIL.

In determining the issue, plaintiff was entitled to the benefit of the probabilities and inferences connected with and growing out of the United States mail service and ordinary experience.

Error to Ingham; Wiest, J. Submitted June 18, 1914. (Docket No. 28.) Decided July 24, 1914.

Assumpsit by Warren Smith against the City National Bank of Lansing for money received to plaintiff's use. Judgment for plaintiff. Defendant brings error. Affirmed.

E. C. Chapin, for appellant,

Gardner & Hood, for appellee.

It is admitted that money was paid into the defendant bank for plaintiff, subject to his order, and that

the bank received his order (check) to pay the money to himself with the instruction, "send in care of Ypsilanti Milling Company, Ypsilanti, Mich." The bank offered testimony tending to prove that upon receipt of this order it made its draft for the money upon the First National Bank of Detroit, Mich., in favor of plaintiff, inclosed the same in a letter of remittance, and deposited letter and draft, in a sealed stamped envelope, in the post office at Lansing, addressed to plaintiff according to his instruction. Upon the upper left corner of the envelope was printed a direction to return the letter to the bank after five days. Plaintiff's check, stamped paid, the books of the bank, and the testimony of various clerks and servants, and the usual course and custom of the business, support this view. The testimony also tends to prove a search at the bank, when nonreceipt of the draft was claimed, among its papers, and even among its waste and discarded papers, which are preserved in sacks for the period of one year, without discovering any trace of the alleged missing draft or letter. The servant of the bank who wrote the letter of remittance and placed it and the draft in the envelope and addressed the envelope, and who daily, personally, carried to and deposited the outgoing mail in the post office, testified to an independent recollection of the transaction from the fact that the instruction of plaintiff gave an address different from the one before employed by him, to which the bank had previously sent letters. He had no independent recollection of depositing the particular letter in the post office. The Detroit bank, the drawee, was notified not to pay the draft. It has not been presented for payment. Testimony for the plaintiff tended to prove that, having sent his instructions to the defendant bank respecting the money, he left Ypsilanti and was absent for several days. John Trufant was president, and Lida, his wife, was secretary, of the Ypsilanti Milling Company. The mail

for that company was delivered by government carrier at 8:30 a. m. and 12:30 and 3:30 p. m., whose custom it was to place it on the top of the office desk of the company. In June or July, 1912, Mrs. Trufant spent some time in the office in the mornings, but was never present when the mail was delivered. Mr. Trufant was usually present when the 8:30 delivery of mail was made, but paid not much attention to the noon and afternoon mail. Mr. Trufant testified that on account of advices from plaintiff he was looking for a letter for him to come from defendant bank while he (plaintiff) was in Northville, and that while he was in Northville no such letter came, to his knowledge. His wife gave like testimony. Testimony tended to show that no such letter had been delivered at the Trufant home, where plaintiff was staying and made his home.

Counsel for defendant relies upon the fact that Mr. Trufant appears to have been the only person who had any knowledge concerning letters delivered to the milling company, and that his testimony covers only the time when plaintiff was absent from Ypsilanti. The witness said:

"I was looking for a letter for him from said bank while he was in Northville.

"Q. Did any such letter come to him from the City National Bank of Lansing while he was at Northville?

"A. No, sir.

"Q. Did any such letter come to the home, to your knowledge?

"A. No, sir."

Defendant declined to pay plaintiff the money unless indemnified by bond. See 3 Comp. Laws, §§ 10183, 10184. Plaintiff sued for the money, and not on the lost instrument.

The principal question of fact submitted to the jury was whether defendant mailed the draft to plaintiff, the instruction being that, if defendant had not satis-

fied them of that fact, plaintiff might recover, if he never received the draft; if not so satisfied, plaintiff could not recover, without filing a bond. A verdict for plaintiff was returned, and, a motion for a new trial having been denied, judgment was entered on the verdict.

It is assigned as error that the court erred in refusing to give certain requests to charge, each of which directly or by necessary implication asserts the vital proposition that the proof establishes the fact, *prima facie*, that the draft was duly mailed. Error is assigned upon the refusal to grant a new trial upon the ground that the verdict is opposed to the weight of the evidence.

While plaintiff does not admit some of the conclusions of law stated or implied by the court in the charge to the jury, he does admit that as the case was tried, and as the jury was instructed, the vital question was whether defendant mailed the draft to the plaintiff. Upon this point he contends there was a question of fact for the jury, although insisting that upon the undisputed facts a verdict should have been directed for the plaintiff.

OSTRANDER, J. (*after stating the facts*). If the question of the mailing of the draft was for the jury, the judgment may be affirmed, without examining other points urged upon our attention by the plaintiff, appellee. The affirmative of the issue is with the defendant. Other testimony than that above referred to fairly tends to support the contention that the draft was never received at Ypsilanti. As opposed to the testimony of the bank's agents, the jury had the testimony that the letter did not reach its destination, that it has not been returned to the bank, and has not been presented for payment. The defendant relies, properly enough, upon a custom in respect to mailing letters. Plaintiff is entitled, in settling the question,

to the benefit of probabilities and inferences connected with and growing out of the United States mail service and the ordinary experience of mankind. Assuming that the interested parties and their witnesses are equally honest, the question must be settled, for the purposes of this case, as one of probabilities. Usually such questions are for the jury, and after an examination of all the testimony we cannot say it is so much more probable that the letter was mailed that the court ought to have directed a verdict for defendant, which in effect was the ruling sought by the requests which were refused.

The judgment is therefore affirmed.

BROOKE, KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred. MCALVAY, C. J., did not sit.

PEOPLE v. PRESTIDGE.

1. CRIMINAL LAW — EVIDENCE — CONFESSION — VOLUNTARY CHARACTER.

The question whether a confession was voluntary or involuntary is for the court, if the matter is clear and the testimony is undisputed; if there is ground for doubt, the court may leave it to the jury to determine whether or not the confession should be considered.¹

2. SAME—INVOLUNTARY CONFESSION—RAPE.

Where the respondent was taken into custody without being informed concerning the charge, was taken to the prosecuting attorney's private office, where he was first

¹ On the question when confession is voluntary, see note in 18 L. R. A. (N. S.) 772.

advised of the fact that he was charged with statutory rape; and where he was advised by the officers that he had better tell the truth, and was questioned closely for two or three hours, and where his wife was brought into an adjoining room and underwent an attack of hysteria, respondent hearing the moans and afterwards admitting that he wished he had told her the truth, etc., the alleged confession of the accused should have been rejected by the court.

Error to Branch; Chester, J., presiding. Submitted June 12, 1914. (Docket No. 101.) Decided July 24, 1914.

Edwin Prestidge was convicted of statutory rape. Reversed.

Palmer & Palmer and *Lockerby & Bowen*, for respondent.

Grant Fellows, Attorney General, and *Charles U. Champion*, Prosecuting Attorney, for the people.

BIRD, J. The respondent was convicted in the Branch circuit court of the crime of statutory rape on his stepdaughter, Mildred Garmen. The people relied for conviction upon the testimony of Mildred, and also upon a statement, which it is claimed the respondent signed, admitting his guilt soon after being taken into custody by the sheriff. The serious question raised by appellant in this court is with reference to the admission of the claimed confession. Considerable preliminary testimony was taken bearing upon the question as to whether the confession was voluntary. The trial court finally admitted the confession, but left it to the jury to determine whether it was voluntarily made. The respondent insists that the trial court was in error in so doing; that he should have rejected the confession on the ground that it was made clear by the testimony that it was not voluntary.

If the preliminary testimony made it clear either that the statement claimed to have been made was voluntary or involuntary, it was the duty of the trial court to admit or reject it. If the testimony left the question in doubt, it was the duty of the court to admit it, and leave the question to the jury under proper instructions to determine whether it was voluntarily made. *People v. Barker*, 60 Mich. 277 (27 N. W. 539, 1 Am. St. Rep. 501). We are persuaded, after a careful review of the uncontradicted testimony, that the statement was made under such circumstances that it was not voluntary. The respondent was taken away from his work between 3 and 4 o'clock in the afternoon by the sheriff. When taken into custody, he inquired the reason, and was told he would be informed later. He was taken to a room in the rear of the prosecutor's private office, where he was informed of the charge made against him, and was questioned by Sheriff Tyler, Undersheriff Miller, and the prosecuting attorney for upwards of two hours as to his past relations with the girl. The respondent repeatedly denied the charge, but was told by Miller that he was lying, and that he had better tell the truth about it. During the time the examination was going on, Mildred was brought in to confront the respondent. What then took place is described by Miller:

"We had been up there probably an hour, maybe not so long as that. Mr. Tyler and Mr. Prestidge and myself in this room, and I went out in the other room where Mildred was and took her into the room where Mr. Prestidge was, in the rear of Mr. Cowell's office. I told her, if what she told me was true, I wanted her to say it to her father, and she told him that what she had told me was true, every word of it, in his presence. By her father, I mean Mr. Prestidge. I asked the girl if her father had been intimate with her, in his presence, and I said, 'If that is true, Mildred, look him in the face and tell him it is so.'

That is word for word as I used it with her in his presence, and she looked him in the eye. I said, 'Ed, why don't you look her in the eye?' She looked him in the eye. She said, 'It is true, and he knows it;' and he dropped his head, and simply said it wasn't true."

The respondent's wife was also brought to the private office of the prosecutor, and while there she became so hysterical over the affair that a physician was summoned to attend her. The respondent was in an adjoining room, and, hearing her cries and moans, requested permission to go in and see her; but this request was denied. The respondent was kept in this room till after dark, when the sheriff and prosecutor left, leaving him in charge of Undersheriff Miller. Miller's version of what was said follows:

"As I said, they had all gone home. Ed and I were there alone, and I says to him, 'Ed,' says I, 'we are alone. Don't you right down deep in your heart wish that you had told your wife the truth in regard to this matter before she went home, and gone down on your knees and asked her forgiveness?' I says, 'Maybe she would have forgiven you. Don't you wish you had done it, Ed?' He says, 'Yes.' I says to him, 'Mr. Cowell has started home, and you are going to jail. Don't you wish you had told him the truth before he went home? If you want a chance to tell him the truth, Ed, I will call him back. Shall I call him back, Ed?' And he says, 'Yes;' and I called Mr. Cowell back."

The prosecutor was then called back, and the respondent was taken to jail, where the statement was written out by the prosecutor and signed by the respondent.

A few of the questions and answers taken from the testimony of Miller will illustrate the character of the examination carried on to secure a statement from the respondent:

"Q. Didn't you say that you had kept him there

from the middle of the afternoon until after Mr. Cowell had gone home at night, and after dark, to have him tell you what you thought was the truth?

"A. I kept him there; yes.

"Q. After he had repeatedly stated to you that it was false, what he was charged with?

"A. He said so; yes.

"Q. But you did not believe him?

"A. I did not; no, sir.

"Q. You were not going to let him go until he had told you something that you believed to be the truth?

"A. Oh, I wasn't going to keep him there all night.

"Q. You were going to give him a good trial?

"A. Yes.

"Q. You gave him quite a sweating out, didn't you?

"A. I did; yes.

"Q. You did it for the purpose of getting him to tell something which you thought was the truth?

"A. I did; yes, sir.

"Q. And all of this statement that he has testified to—that you claimed he admitted, was that after you had brought him to that state where you wanted to leave him?

"A. Oh, I don't know as to that.

"Q. One thing is certain, Mr. Miller; he never made any kind of a statement until after you had placed him in that sweat box for three hours or more; isn't that a fact?

"A. Oh, I don't know how long we had been there.

"Q. He had been there long enough, hadn't he?

"A. Why, I think so.

"Q. So that they had gone home for the night? Mr. Tyler had gone to his place?

"A. Yes, sir; and Mr. Cowell had gone home.

"Q. Now, Mr. Miller, before he had made any admissions, as a fact, you said, 'Now, Ed, you are going to jail. Don't you think it would have been best to have gotten right down on your knees and begged your wife's forgiveness, and maybe she would have forgiven you?' Isn't that right?

"A. And tell the truth? I did; yes, sir.

"Q. What you thought was the truth?

"A. Yes, sir. * * *

"Q. In other words, you went in there with the

idea in your mind as to what the truth was, didn't you?

"A. I believed the girl.

"Q. In your mind, you believed the girl, and went in there with that idea as to the truth?

"A. Yes, sir.

"Q. And you kept that man there until he admitted to what you believe was the truth?

"A. He did; yes, sir.

"Q. In the meantime, to bring it about, you told him that, if he would do that, maybe his wife would forgive him?

"A. I did.

"Q. When, as a matter of fact, there hadn't been a word said with his wife—or that his wife believed him guilty, was there?

"A. Not to me."

The respondent's version of his treatment makes the situation more serious; but much of his testimony was contradicted. It will be unnecessary, however, to consider the testimony that was in conflict. The respondent states that during the time of the examination he was very nervous and nearly crazy. It is not incredible that he should have been in that condition at the end of two or three hours of grilling such as he received. It is needless to argue that a statement made under such pressure is voluntary, whether it is true or false. *Flagg v. People*, 40 Mich. 706; *People v. Wolcott*, 51 Mich. 612 (17 N. W. 78); *People v. Barker, supra*; *People v. Stewart*, 75 Mich. 21 (42 N. W. 662). Had such an examination taken place solely to satisfy the minds of the prosecuting officers as to whether the accused was guilty, it might find some justification; but to subject the respondent to such an ordeal, with the deliberate purpose of securing a statement to be used as evidence against him, is a practice not included among the duties of prosecuting officers. It was doubtless done in good faith; but it was a case where their zeal clearly outran their

duty. We are satisfied that under the showing made the statement was inadmissible, and should have been rejected. The conviction must be set aside, and a new trial granted.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, MOORE, and STEERE, JJ., concurred.

ATTORNEY GENERAL, *ex rel.* LODGE, *v.* BRYAN.

CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS—COUNTY BOARD OF SUPERVISORS—WYANDOTTE CHARTER—ELECTION OR APPOINTMENT—CITIES.

Under the charter of the city of Wyandotte, framed pursuant to Act No. 279, Pub. Acts 1909 (2 How. Stat. [2d Ed.] § 5442 *et seq.*), and requiring the city commission to select supervisors of election who should serve with the assessor on the board of supervisors, the appointment by the commission was constitutional and valid: it is not essential that the supervisors should be elected in order to comply with the home rule law and with the Constitution, art. viii, §§ 7, 18, since the people of the city, by adopting a charter that provided for such appointment, made choice of its method of selecting the representative on the board. The townships in the county could have no voice in the matter by whichever method the supervisor should be designated.

Quo warranto by Grant Fellows, attorney general of the State of Michigan, on the relation of John C. Lodge, against Edward C. Bryan, Theodore Megges, George McTaggart and Louis Pernot, to determine the title of respondents to the office of supervisors of the

county of Wayne. Submitted June 15, 1914. (Docket No. 122.) Decided July 24, 1914.

Grant Fellows, Attorney General, *Allan H. Frazer*, Prosecuting Attorney, and *Paul W. Voorhies*, Assistant Prosecuting Attorney, for relator.

George W. Coomer (*Thomas A. E. Weadock*, of counsel), for respondents.

BIRD, J. The constitutional right of the respondents to represent the city of Wyandotte on the board of supervisors, is questioned by quo warranto proceedings, instituted in this court by the attorney general, on the relation of John C. Lodge, chairman of said board. Prior to the 2d day of March, 1911, when the people of Wyandotte voted to adopt a new charter, the city was incorporated under the Public Acts of 1895 as a fourth-class city. Act No. 215, Pub. Acts 1895 (2 How. Stat. [2d Ed.] § 5478). It was divided into four wards, and elected four supervisors, who represented the city on the board. On the 4th day of March, 1911, the new charter became effective. Section 19 of chapter 5 of the new charter provides for representation of the city upon the board of supervisors in the following manner:

"On the 3d Monday of April, A. D. 1911, and on the 3d Monday of April in each year thereafter, there shall be appointed by majority vote of the city commission the following officers: A city assessor who shall be *ex officio* supervisor of elections in the voting precinct in which he resides, and a supervisor of elections for each voting precinct, except that in which the assessor resides. The city assessor and such of the other supervisors of elections as the city commission may designate shall represent the city on the board of supervisors of Wayne county.

"The supervisor of elections shall perform all duties imposed by the general laws of the State on supervisors of townships, except those duties relating to

the assessment and levy of taxes, and such duties as are by this charter imposed on other officers."

In pursuance of this provision, a city assessor and three supervisors of election were appointed by the commission. These appointments fell to the respondents, and later they were appointed to represent the city on the board of supervisors, and they are now acting in such capacity. The question raised by relator against the right of respondents to seats in that body is that—

"The board of supervisors is distinctly the legislative body of the county, and is clothed with the power of determining, among other things, the amount of money to be raised by taxes, and to apportion the same among the various cities and townships of said county. Such a body, under the implied provisions of the Constitution, must be composed of members elected directly by the electors, and not appointed."

The provisions of the Constitution which appear to throw some light on the controversy, are the following:

"A board of supervisors, consisting of one from each organized township, shall be established in each county, with such powers as shall be prescribed by law." Article 10, § 6, Const. 1850.

"There shall be elected annually on the first Monday of April, in each organized township one supervisor, * * * whose powers and duties shall be prescribed by law." Article 8, § 18, Const. 1909.

"Cities shall have such representation in the board of supervisors of the counties in which they are situated as" the legislature may direct. Article 10, § 7, Const. 1850.

In the Constitution of 1909, sections 6 and 7 of article 10 are consolidated without change as section 7 of article 8. It is reasonably clear from the first two sections quoted that the legislature has no power to say what representation a township shall have upon the board, nor has it any power to prescribe how its representative shall be elected. Section 7, however,

imposes the duty on the legislature to specify what representation cities shall have upon the board. This duty has been discharged with reference to new charters, by the passage of section 27 of Act No. 279 of the Public Acts of 1909 (2 How. Stat. [2d Ed.] § 5442 *et seq.*), which provides that:

“Each city, except as is otherwise provided by law, shall have at least one representative on the board of supervisors of the county. The present representation of cities now organized on such boards of supervisors shall remain as now fixed, until changed according to law, but no city shall have power to increase its representation on such board of supervisors.”

The legislature has done more than to provide what representation cities shall have; it has provided in subdivisions (a) and (b) of section 3, Act No. 279 of the Public Acts of 1909, that such representation should be “*elected or appointed.*” I do not understand that the relator questions the right of the legislature to provide what representation the city shall have, but he denies the right of the legislature to say that such representation shall be appointed. The argument of relator relies for support upon a class of cases wherein it is held that it is not competent for the legislature to delegate the taxing power for local purposes to municipal boards whose members are agents of the State, or whose members are not answerable directly to the people they are to represent. *Board of Park Commissioners v. Detroit Common Council*, 28 Mich. 228 (15 Am. Rep. 202); *Vallely v. Board of Park Com'rs*, 16 N. D. 25 (111 N. W. 615); *State v. Mayor of Des Moines*, 103 Iowa, 76 (72 N. W. 639, 39 L. R. A. 285, 64 Am. St. Rep. 157); *Gage v. Graham*, 57 Ill. 144; *Board of Directors for Leveeing Wabash River v. Houston*, 71 Ill. 318.

The objection to the legislation involved in these

cases lies either in the fact that the bodies to whom the taxing power was delegated were not municipal agencies, or that the legislature had imposed a system of taxation, for local purposes, upon the municipality in which the residents thereof had no voice in the selection of the taxing officers. No such objections, however, can be seriously urged against the act of the legislature creating the "Home Rule" statute. Act No. 279, Public Acts of 1909 as amended. In passing that act, the legislature left it optional with the electorate to decide whether they will accept its provisions. The municipality is free to accept or reject it. If they accept its provisions and afterwards become displeased with its workings, they may cast them off by the same process by which they were acquired. Therefore it cannot be said that the people of Wyandotte are subjected to a system in the creation of which they have had no voice. Neither can it be said that they had no voice in the selection of their representative. The proposed charter put it squarely up to the voters to say whether their representative should be appointed, and they have given their assent to it. Possibly it may be said that the people of Wyandotte are not the only ones interested, inasmuch as the board of supervisors legislate for the entire county. The answer to this is that the other townships and cities would have no more voice in the selection of Wyandotte's representatives, even if they were elected instead of being appointed.

But aside from these considerations, we think the question is foreclosed by the holding of this court in *Attorney General v. Preston*, 56 Mich. 177 (22 N. W. 261). The question there involved was the right of the president of the village of Mackinac to a seat on the board of supervisors of Mackinac county. In that case the court took occasion to construe sections 6 and 7 with respect to the power and duty of the legislature, and there said:

"The effect of the two sections, as we construe them, is to limit the power to give organized townships more than one representative on the board, and imposes the duty of giving cities some representation therein, but leaving the number of representatives, *and the manner of their selection, to the determination of the legislature.*"

This interpretation, therefore, clearly defines, not only the power but the duty of the legislature to prescribe what representation cities shall have upon the board, but also establishes its right to prescribe the manner in which such representation shall be selected. In the exercise of this authority the legislature has provided that such representation may be by election or appointment, and the very people who are to be affected have said by their charter that it shall be made by appointment. This is home rule, and is final.

Judgment for respondent, without costs.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, MOORE, and STEERE, JJ., concurred.

GARNEAU v. COMMISSION OF CITY OF CADILLAC.

ELECTIONS—MUNICIPAL CORPORATIONS—MAJORITY OF VOTES—COMMISSION FORM OF GOVERNMENT.

The provisions of the Cadillac charter requiring that the candidate for any office who shall receive a majority of the first-choice votes for such office shall be declared elected, and if no candidate shall receive a majority of the first-choice votes, then the second-choice votes shall be added to the first-choice votes and the one receiving the largest number of combined first- and second-choice

votes shall be declared elected, etc., require a majority of all the votes cast for the office in order to elect; a plurality is insufficient even if none of the candidates receives a majority, where the charter expressly defines a majority as more than half the total votes cast.

Certiorari to Wexford; Lamb, J. Submitted June 9, 1914. (Calendar No. 26,214.) Decided July 24, 1914.

Mandamus by Theodore Garneau to compel the commission of the city of Cadillac, being the board of election canvassers of the city, to reconvene and declare him elected to the office of constable. From an order denying the writ relator brings certiorari. Affirmed.

Gaffney, Miltner & Millington, for relator.

E. F. Sawyer, for respondent.

BIRD, J. The city of Cadillac has a commission form of government. On the 10th day of February, 1914, an election took place at which a constable was to be elected. For that office there were three candidates—the relator, Charles H. Sinclair, and William Trey. Section 6 of article 5 of the charter provides that, where three candidates are to be voted for, the voters shall be given opportunity of expressing, not only their first choice, but their second choice. This provision was complied with. The canvassed vote showed the result to be:

	First- Choice.	Second- Choice.	Total Vote.
Relator	419	79	498
Sinclair	382	108	490
Trey	335	148	483

No candidate appearing to have a majority of all the votes cast, the canvassing board determined that no one was elected. The board was guided in their

determination by section 10 of article 5 of the new charter, which provides that:

"The candidate for any office receiving a majority of first-choice votes cast for candidates for that office shall be declared elected. If no candidate shall receive a majority of the first-choice votes for such office, then the second-choice votes received by each candidate for such office shall be added to the first-choice votes for each such candidate, and the candidate receiving the largest number of first-choice and second-choice votes combined, if such votes constitute a majority, shall be declared elected. If no candidate shall have a majority, after adding the first-choice and the second-choice votes, the third-choice votes received by each candidate shall be added to the combined first-choice and second-choice votes received by such candidate and the candidate having the largest number of first-choice, second-choice and third-choice votes combined, shall be elected to such office, whether such number constitutes a majority of all the votes cast or not. * * *

"Whenever the word 'majority' is used in the preceding section it shall mean more than one-half of the total number of votes cast at such election for the office in question."

The relator was not content with the result reached by the canvassing board, and he appealed to the circuit court for a writ of mandamus to compel the board to reconvene and declare him elected. After a hearing the trial court denied the application, and the matter was then removed to this court by a writ of certiorari. The sole question before us is whether the word "majority," as used in section 10, should be construed to mean "plurality." The relator's contention is that it should be so construed.

There are at least two serious difficulties which stand in the way of giving effect to the construction contended for by relator:

(1) The framers of the charter made it clear what meaning should be given to the word "majority" wherever used in that section. They, as though fear-

ing it would be misconstrued, construed it themselves by declaring in express language that it should "*mean more than one-half of the total number of votes cast at such election for the office in question.*"

(2) It is evident from the language used in section 10 that two different rules were intended in determining the result. When three candidates are voted for, a majority rule is specified. When there are more than three candidates, a plurality vote will elect. Should we now construe the word "majority" to mean "plurality," then the obvious distinction intended fades away, and a like rule obtains in both cases.

These and other considerations lead to the conclusion that the word "majority" was used to convey the meaning which is given to it by the lexicographers. To hold otherwise would be to do violence to the language used. If it is found that an "impossible" provision has been injected into the organic law of this simplified form of municipal government, it is for the people, and not for the courts, to correct.

The order of the trial court was right, and is hereby affirmed.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, MOORE, and STEERE, JJ., concurred.

PESOLA v. FORSTEN.

1. BAILMENTS—ANIMALS—HORSES—DUE CARE.

The bailee of a horse for hire, to be used in a lumber camp, was under obligation to the bailor to see that the horse was used and treated with reasonable care, and in the way in which such animals are ordinarily treated by prudent men, who own or have them in charge.

2. PLEADING—TRESPASS—CASE—DISTINCTIONS ABOLISHED.

Since the passage of Act No. 77, Pub. Acts 1905 (5 How. Stat. [2d Ed.] § 13114), the distinction between trespass and case no longer exists, and a declaration framed in case for failing to place the horse in the hands of a competent driver and to treat it in a reasonably prudent and safe manner or to protect the same from brutal treatment, so that the animal became sick because thereof and died, stated a cause of action.

3. MASTER AND SERVANT—BAILMENTS—ANIMALS—CRUEL TREATMENT—PRINCIPAL AND AGENT.

Where it appeared from the evidence that defendant's servants punished plaintiff's horse with a stick six or seven feet long and two inches in diameter and struck her on another occasion with a cant hook, and again with a log chain, not because of vicious conduct on the part of the animal, but because of the fact that she was slow and they wanted to expedite the work, the tort was not committed out of the line of the servant's employment and the defendant was liable and could not avoid responsibility, on the theory that the wrong was wilful and intentional and not within the scope of the servant's authority.

Error to Chippewa; Hudson, J. Submitted November 11, 1913. (Docket No. 87.) Decided July 25, 1914.

Case by Matt Pesola against Victor Forsten for negligent injuries to plaintiff's mare. Judgment for plaintiff. Defendant brings error. Affirmed.

F. T. McDonald, for appellant.

A. E. Sharpe, for appellee.

BIRD, J. Plaintiff sued and recovered a judgment against the defendant in an action on the case for the loss of a mare which died while being used by defendant in his lumber camp near Trout Lake. It was the claim of plaintiff that the mare died as the result of cruel and brutal treatment inflicted by the servants of defendant. The defense contended that she died from natural causes. When plaintiff's counsel had

concluded his opening statement to the jury, defendant requested a directed verdict on the ground that neither the declaration nor the opening statement of counsel stated a cause of action. The request was refused, and error is assigned thereon.

The negligence counted upon in the declaration was the failure of defendant to place the mare in the hands of a "competent, careful, and prudent driver;" "to treat and use the mare in a reasonably prudent, careful, and sane manner;" "to protect her from cruel and brutal treatment and from intentional injury by her driver." It is further alleged that she became sick and afterwards died in consequence thereof. If the defendant was using the mare in his lumber camp under an arrangement for hire, as the proof shows, he was under obligation to the plaintiff to see that the mare was used and treated with reasonable care, and in the way in which such animals are ordinarily treated by prudent men who own or have them in charge, and, if he failed to observe this obligation, he would be liable for the subsequent loss which was traceable to such failure. *Hofer v. Hodge*, 52 Mich. 372 (18 N. W. 112, 50 Am. Rep. 256).

In pressing his argument that no negligence is alleged or stated, defendant reminds us that the action is "trespass on the case" and not "trespass." If we concede that trespass would have been the more appropriate action, it is of no importance, since the statute gives plaintiff the right to bring an action on the case wherever trespass could be maintained. Act No. 77, Pub. Acts 1905 (5 How. Stat. [2d Ed.] § 13114). The trial court was of the opinion that the declaration stated a cause of action, and we think there was no error in so holding.

Again, at the close of the testimony, defendant requested a directed verdict. The reason assigned therefor was that the proofs failed to disclose any negligence on the part of the defendant. There are

several assignments of error, and most of them are directed to this point. To support this contention, counsel insists that the testimony shows that the cruel and brutal treatment of the mare was wilful and intentional, and for such conduct on the part of the servants the defendant would not be liable.

The testimony shows that on one occasion the mare was punished with a stick, six or seven feet long and two inches in diameter; on another occasion, she was struck with a cant hook; on still another, with a log chain. It does not appear, however, that she was punished because she was vicious, but a fair inference from the testimony is that she was maltreated in these ways because she was slow in working and walking, and that the punishments were inflicted to hasten her movements, and the testimony furnishes inferences that she died from the effects of this rough usage. The argument that the acts were wilful and intentional on the part of the servants, and in consequence thereof the defendant is not liable therefor, we do not think can be maintained under the circumstances disclosed by this record. The acts were committed by the servants while in the employ of the defendant, and while engaged in the work they were employed to do, and evidently for the purpose of expediting that work. It does not appear from the testimony to be a case where the servant turns aside from the work of the master for the moment, and commits an intentional tort on his own personal account, but rather a case where the servant, while in the direct line of his work, loses his patience with the animal over which he has control, and inflicts punishment because she is so slow in doing her part of the master's work.

The trial court explained to the jury the law on this phase of the case, and instructed them under what circumstances the defendant would be liable for

the acts of his servants and left it to them to decide whether the punishments inflicted were wilful and intentional. In so doing he said to them, in part:

"It is the law that, for a positive wrong, beyond the scope of the master's business, that is, as applied to a case of this kind, where the servant actually and intentionally, stepping aside from the scope of his employment, from the work in which he was engaged, intentionally and recklessly and wantonly committed an injury on this mare, then the defendant is not responsible for the act of the servant so committed. But when the wrong arises merely from an exercise of authority, such as overdriving or beating this horse to urge it to greater effort and higher speed, in furthering Mr. Forsten's interest while hauling or skidding his poles or other timber, and Mr. Forsten received the benefit of that labor, then he must be held liable as fully as though he himself committed the act complained of."

We are of the opinion that this part of the charge was more favorable to defendant than he was entitled. This was a bailment for hire, and the degree of care that is required is that care which an ordinarily prudent man exercises with his own. If he or his servants failed to exercise that degree of care, and in consequence thereof damage resulted to the mare, the defendant would be liable, and this would be true whether the failure of the servants to exercise such care while acting within the scope of their employment was wilful and intentional or otherwise. In either event it would be the act of the bailee. 5 Cyc. pp. 185, 186; Schouler on Bailments and Carriers (3d Ed.), §§ 19, 20; *Hofer v. Hodge*, 52 Mich. 372 (18 N. W. 112, 50 Am. Rep. 256).

We think there is no merit in the remaining assignments of error.

The judgment is affirmed.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, MOORE, and STEERE, JJ., concurred.

ATTORNEY GENERAL, *ex rel.* JAMES, v. NATIONAL CASH REGISTER CO.

1. CORPORATIONS—RIGHT TO DO BUSINESS—QUO WARRANTO—MONOPOLIES—ANTI TRUST ACT.

Evidence tending to show that respondent corporation used unlawful means in competing with its business rivals; that it interfered with their contracts and salesmen; that it circulated damaging statements relating to their credit and standing; that it employed spies, and instituted numerous suits for infringement of patents without intending to prosecute them to a final conclusion, etc., reviewed, and *held*, to establish the averments of relator's petition in quo warranto, charging that respondent exercised a monopoly in the business of manufacturing and selling cash registers, and *held*, that the intent to create a monopoly was shown to exist. Act No. 329, Pub. Acts 1905 (2 How. Stat. [2d Ed.] § 2945).

2. SAME—DEFINITION—TRUSTS AND MONOPOLIES.

A monopoly, in the modern sense, is created when, as a result of efforts to that end, previously competing businesses are so concentrated in the hands of a single person or corporation, or a few persons or corporations acting together, as that they have the power to practically control prices of commodities and thus suppress competition.

3. SAME—EVIDENCE—UNFAIR COMPETITION.

It is sufficient if the relator shows that the incorporators of the respondent acted together to establish a monopoly in pursuance of a common object; an agreement or contract to work together need not be proved.

4. SAME—EVIDENCE—CONSPIRACY.

Where the effect of the testimony offered was to establish that successive corporations had been formed under the laws of different States and had carried out or furthered the creation of a monopoly with the co-operation of the principal stockholders, that the same parties had been interested in the various companies that had been formed, and the existing company had substantially the same officers and stockholders as the first organization, evidence

was admissible to show the wrongful acts and purpose of the corporations existing prior to the organization of respondent and might properly be considered as explaining and characterizing the acts of respondent.

5. **SAME—PRINCIPAL AND AGENT—ADMISSIONS AND ACTS OF AGENTS.**

Acts and conduct of officers and agents of the respondent were admissible in evidence to show the purpose to create a monopoly: and specific transactions and admissions of agents and sales managers done in furtherance of their employment were valid proof of the illegal intent, although a part thereof took place a number of years prior to the admission of the present corporation to transact business in Michigan.

6. **SAME—CONTRACTS—WRONGFUL INTERFERENCE.**

There are two ways, at least, of interfering illegally with contracts of other persons, *first*, by preventing the making of such contracts; *second*, by causing them to be broken after they are made.

7. **SAME—BREACH OF CONTRACT—ACTIONS.**

To establish a right of action for procuring a party not to enter into contract relations, it is essential to prove: (1) notice to the defendant of the relation existing between the parties to the proposed contract; (2) interference with that relation, and (3) damages resulting from this interference.

8. **SAME—MISUSE OF COURTS AND PROCESS.**

While it is lawful and proper for the owner of a patent to give notice of infringement to any person using an infringing article and it is permissible to prosecute a suit against the infringer or user, or to bring an action for damages, the proceedings must be instituted in good faith and not to annoy or intimidate or drive out of business a competitor.

9. **SAME—UNFAIR COMPETITION—EXCUSE.**

As an excuse for resorting to unfair means of competition it was not sufficient that competitors of the respondent also employed similar measures, or that their acts were unlawful.

10. **SAME—MONOPOLIES—PUNISHMENT—FINE.**

The punishment to be imposed under the statute (3 Comp. Laws, § 9961; 5 How. Stat. [2d Ed.] § 14076), rests in the sound discretion of the court whether a judgment of ouster

should be entered or a fine imposed; and *held*, under the evidence, that a fine of \$10,000 should be assessed against respondent.

Information in the nature of quo warranto by John E. Bird, Attorney General of the State of Michigan, on the relation of Henry F. James, against the National Cash Register Company, a foreign corporation, to terminate the right of respondent to engage in business in the State of Michigan on the ground that it is exercising a monopoly. Submitted February 2, 1914. (Docket No. 25.) Decided July 25, 1914.

Grant Fellows, Attorney General, and *Samuel D. Pepper*, Assistant Attorney General (*Henry E. Chase*, of counsel), for relator.

William L. Carpenter and *John F. Wilson* (*Lawrence Maxwell*, of counsel), for respondent.

STONE, J. This is an information in the nature of a quo warranto on behalf of the people of this State, on relation of Henry F. James, filed in this court on July 14, 1909, in and by which the court was informed that the National Cash Register Company, an Ohio corporation, admitted to do business in Michigan, had been for the year last past, and then was, violating the anti-trust laws of Michigan in establishing and maintaining a monopoly of the business of manufacturing, buying, selling, and dealing in cash registers, and conspiring with its officers, directors, stockholders, agents, and others to create and maintain a monopoly, and to suppress all competition, and to control the manufacture and sale of cash registers; it is alleged to that end it has carried on a war of extermination against all competing manufacturers, dealers, and agents until it has very little competition, and has practically a monopoly of the business, manufacturing and selling 95 per cent. of all the cash registers made

and sold in the world, its intention, purpose, policy, and object being to eliminate all competition, present and future, and to be the only manufacturer and seller of cash register machines in the world; and it is alleged that in the carrying out of such intention, purpose, policy, and object it has used, among others, the following methods: Interference with competing companies; interference with competing salesmen; interference with sales made by competing salesmen, and interfering with the contracts of competing companies; following and interfering with the business of competing salesmen; interfering with the mechanism of competing machines; watching and spying out the shipments of competing companies; watching the factories of competing manufacturers; circulating damaging statements relating to the standing and business of competing companies; maintaining a display window of competitive machines, and advertising to sell them at 30 cents on the dollar; manufacturing and using knockout machines; employing secret agents, detectives, spies and knockout men; the use of knockout credit cards; placing its employees in offices of competing companies without the latters' knowledge; blocking sales of competitors; instituting many suits and threatening to bring others against manufacturers and competing companies, and against their customers; bringing infringement suits without intention of prosecuting them; and, in many other ways too numerous to mention, endeavoring to establish a monopoly in the business. Attached to the brief of the attorney general is a list of competing companies which it is claimed have been put out of business by the respondent.

The pleadings are too lengthy to be set forth in detail. It may be sufficient to say that, some question having been raised as to the prolixity of the replication, the following order was entered in this court in

pursuance of a stipulation. The order reads, in substance, as follows:

"On reading and filing the stipulation of the parties to the above entitled cause, by the respective counsels, and in pursuance thereof, it is ordered that the following are the controverted issues of fact to be determined in this cause:

"(1) Was the respondent organized and incorporated under the laws of the State of New Jersey and later under the laws of the State of Ohio?

"(2) Was the respondent organized for the purpose and with the intent of establishing and maintaining an unlawful monopoly of the business of manufacturing, buying, selling, and dealing in cash registers in the United States?

"(3) Did respondent file its articles of association and certificate with the secretary of State of the State of Michigan and pay the fee required by statute to be paid by foreign corporations desiring to do business in Michigan, with the intent and purpose of establishing and maintaining an unlawful monopoly of the business of manufacturing, buying, selling, and dealing in cash registers in the United States?

"(4) Has respondent done business in Michigan and exercised the rights, privileges, and franchises of a corporation within the State of Michigan with or in pursuance of any purpose or intent to establish and maintain an unlawful monopoly of the business of manufacturing, buying, selling, and dealing in cash registers in the United States, and, if so, during what time?

"(5) Since filing the articles of association in the State of Michigan, has much of the business transacted by the respondent in the State of Michigan been commerce among the several States of the United States within the meaning and intent of section 8, article 1, of the Constitution of the United States?

"It is further ordered that neither party shall, by reason of the making of the stipulation, as to the issues in said cause, waive the right to insist upon a judgment in his or its favor, notwithstanding the finding upon any or all of the issues herein settled.

"It is further ordered that the motion for reformation of the replication heretofore filed by the respond-

ent in this cause be, and is hereby, dismissed without cost to either party."

Without referring to all the legislation upon the subject, it may be well to insert here section 4 of Act No. 329 of the Public Acts of 1905 (2 How. Stat. [2d Ed.] § 2942 *et seq.*); that section reads as follows:

"Any foreign corporation organized for the purpose and with the intent of establishing and maintaining or of attempting to establish and maintain a monopoly of any trade, pursuit, avocation, profession or business, is hereby prohibited from doing business in this State, and any permission or authority heretofore obtained by any such corporation to do business in this State is hereby declared to be illegal and void."

The history of the National Cash Register Company and its predecessors is substantially as follows:

John H. Patterson and Frank J. Patterson, brothers, coal mine owners and dealers in the State of Ohio, purchased, in the year 1882, for \$6,500, an interest in the National Manufacturing Company, an Ohio corporation, manufacturing cash register machines at Dayton, Ohio. In the year 1884 the name National Manufacturing Company was changed to National Cash Register Company, and John H. Patterson and Frank J. Patterson became majority stockholders. In the year 1886 the company was reorganized and John H. Patterson and Frank J. Patterson acquired the entire capital stock and became sole owners of the National Cash Register Company. On the 27th day of March, 1899, the National Cash Register Company was incorporated under the laws of the State of New Jersey, and ceased to do business as an Ohio corporation. On the 19th day of March, 1906, the National Cash Register Company was incorporated under the laws of the State of Ohio and ceased to be a New Jersey corporation, and has since such time been an Ohio corporation. On the 11th

day of July, 1906, the National Cash Register Company complied with the requirements of Act No. 206 of the Public Acts of 1901, and was admitted to do business in Michigan. John H. Patterson has been president and majority stockholder of the National Cash Register Company since 1886, and has controlled, directed, and dictated its policy of business regardless of any and all changes in its corporate life or affairs. It has grown from a \$10,000 to a \$10,000,000 corporation, manufacturing 400 cash registers a day, more than 250 kinds of machines, employing from 4,500 to 5,000 persons in its factory and 1,800 to 2,000 persons outside the factory, with agencies in nearly all the countries in the world. In the guides manual, a handbook of information published by the National Cash Register Company, in September, 1905, is found the following statement:

"We not only show the different improvements in the National, but also the different registers manufactured by our former competitors. Two hundred of these concerns have started in the cash register business. All but two have gone out of business. They have wasted amounts ranging from \$5,000 to \$500,000 cash each; in all, more than five million dollars."

On June 12, 1912, by agreement of counsel, the following statement was made on the record by counsel for respondent in response to a request which counsel for the prosecution had made:

"During the period from 1884 to date, 404 United States patents issued to the National Cash Register Company on its inventions, 210 were purchased from manufacturers, 218 purchased from individuals, 50 doubtful whether they were the invention of the company's inventors or whether they were acquired from outside individuals, and two were acquired on a royalty basis. The National Company has now about 200 applications pending in the United States Patent Office. Of the 218 just listed as purchased from in-

dividuals, this includes about 70 which it is doubtful whether they should be classed as manufacturers or individuals, for the reason that there were groups of patents acquired from individuals organized under a company name, but there is no way of telling from company records whether they ever did any manufacturing at the time of purchase, or whether they made anything more than a few models. It should also be understood that all of the above figures are only approximate, and are the best we can get from incomplete records."

A vast amount of testimony has been taken in this case. Counsel having disagreed as to the tenor, scope, and effect of this testimony, it has been necessary for us to read over 2,000 printed pages of the record in this case. The testimony offered by the prosecution covered the period from 1882 to June, 1912. Much of this testimony was objected to by respondent as immaterial and in no way affecting the present corporation. It has been urged by counsel for the respondent that the court should not consider the testimony relating to the business transactions of respondent prior to its being admitted to do business in this State, and it has been even urged by respondent that the court should not consider the testimony relating to the manner of conducting respondent's business prior to the filing of the information in this case. We shall speak of this subject later.

It is the contention of the prosecution that, under the circumstances as disclosed in this case, it is competent for the court to consider the manner of doing business by the respondent, not only since 1906, when it became an Ohio corporation, but also for the prior years, because the corporation has substantially been the same, although organized under the statutes of different States, and that the business has been from the first dominated and controlled by John H. Patterson, who has been the president and controlling spirit during all of the intervening years. It is the conten-

tion of the prosecution that in order to ascertain the intent of the respondent to create and maintain a monopoly it was not only competent, but necessary, to trace its course and manner of doing business during all the years covered by the testimony in the case, at least for the purpose of considering whether there has been any change in the manner of doing business on the part of the respondent from its early organization down to the time of the taking of the testimony in this case. It is the claim of the prosecution that it has been the fixed policy of the respondent, during all these years, to drive out and destroy all competition and to create a monopoly in the business; that notwithstanding the conflict in the testimony, on many points, there is a clear preponderance of evidence to the effect that the statute has been violated. Much of the evidence consists of letters and publications of respondent, its officers and agents. In our opinion the burden of proof resting upon the prosecution has been sustained, and it has been shown that the respondent was organized for the purpose and with the intent to establish and maintain a monopoly in the business in which it has been engaged. A monopoly has been variously defined. As applied to the case in hand, the following definitions appear to be appropriate:

“A monopoly, in the modern sense, is created when, as a result of efforts to that end, previously competing businesses are so concentrated in the hands of a single person or corporation, or a few persons or corporations acting together, that they have power to practically control the prices of commodities and thus to practically suppress competition.” *United States v. Tobacco Co.* (C. C.), 164 Fed. 700-721, and cases there cited.

“A monopoly exists where all or so nearly all of an article of trade or commerce within a community or district is brought within the hands of one man or set of men, as to practically bring the handling or produc-

tion of the commodity or thing within such single control, to the exclusion of competition or free traffic therein." Cooke on Combinations, Monopolies and Labor Unions (2d Ed.), § 116, and cases there cited.

See, also, Joyce on Monopolies, § 8, citing *Davenport v. Kleinschmidt*, 6 Mont. 502 (13 Pac. 249), and other cases.

The purpose and intent of the organization may be shown by its acts and the policy pursued after organization. It is not necessary, in order to bring the respondent within the operation of the statute, to show that its organizers expressly bound themselves, each with the other, to establish and maintain a monopoly of the business of manufacturing, buying, selling, and dealing in cash registers. It is sufficient if it is shown that they acted together in pursuance of a common object, and, while this presupposes agreement between them in a broad sense, an agreement or contract in a technical sense need not be shown.

In *International Harvester Co. v. Commonwealth*, 144 Ky. 403 (138 S. W. 248), it was said:

"It is not necessary, to sustain a conviction in cases like this, that there should be positive evidence that a combination or conspiracy was formed, and that the purpose of it was to fix, regulate, and control prices. A rule of evidence like this would, in almost every case, operate to defeat the execution of the law, as it would be difficult, if not impossible, in many cases to introduce witnesses who could testify of their own knowledge that such a combination was formed, and that its purpose was to fix or control prices. * * * There are many cases in which the intention to violate the law is a necessary ingredient in the offense, but the Commonwealth is not required to show by direct evidence the existence of this intent. A rule of evidence like this would defeat, in a majority of cases, the ends of justice, as it is not often that persons who contemplate violating the law make known in advance their purpose in such a way as that it can be proven against them. And so, to meet conditions

like this, the law presumes that persons of accountable years intended to do that which they did do, and will infer from the act that the intention to commit it existed."

It is urged by counsel for the respondent that it was immaterial and irrelevant to show the conduct and course of business of respondent prior to the time of the filing of the information in the case. The pleadings on behalf of the people set forth in detail the organization of prior and successive corporations in Ohio and in New Jersey for the purpose of conducting the business and property to which the respondent has, in its turn, succeeded. They also charge these former corporations with being parties to the original conspiracy which, it is claimed, has been maintained through all the life of each of said corporations, and is still being maintained by the respondent. The charge is, and the evidence tends to support it, that the respondent is composed of the same stockholders, having the same officers and agents as each of the former corporations, and that it is in fact identical in body and mind with each of the original corporations, and that this identity has been maintained at all times since the original combination or conspiracy, as charged, was formed. It is true that each corporation is a separate legal entity, but, as stated by the supreme court of Ohio in *State v. Standard Oil Co.*, 49 Ohio St. 137 (30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541), this—

"Legal entity, apart from the natural persons who compose it, is a mere fiction, introduced for convenience in the transaction of its business, and of those who do business with it; but * * * when urged to an intent and purpose not within its reason and policy, may be disregarded."

It would be without reason to say that certain individuals could organize themselves into a body politic and corporate, which fictitious entity might

become a party to a conspiracy to violate the law in the creation of a trust or monopoly in the destruction of competition; that when it had contributed by its efforts and its capital largely to this end, these same individuals might abandon that corporation, lest they and it be punished for the wrong, and its charter revoked, organize a new and independent corporation to take its place in the conspiracy, so that the business might go on uninterrupted and unchallenged by the State, and this new corporation, or new conspirator, joining the conspirators in the furtherance of the common design, and accepting all the property, benefits, and advantages already acquired for it by the united efforts of the former corporation and its conspirators, yet be exempt because it had no part in the original conspiracy.

It was held in *Cooke v. People*, 231 Ill. 9 (82 N. E. 863), that:

“Every person who enters a conspiracy already formed is deemed, in law, a party to all acts done by any of the other parties, before or afterwards, in furtherance of the common design; and the entry of such persons into a conspiracy already formed does not make a new and distinct conspiracy.”

While in the instant case, in order to prevail, the people must show that the respondent has, since July 11, 1906 (the time when it was admitted to do business in this State), been organized for the purpose and with the intent of establishing and maintaining, or of attempting to establish and maintain, a monopoly, yet we think it is competent to show the acts done or committed by its predecessors in the claimed conspiracy, for the purpose of characterizing and explaining its conduct since its coming into this State. It is true that respondent is not to be punished for the acts and wrongs of others, unless it has become a party to the wrongs complained of, and has taken its place in the conspiracy charged, and has been do-

ing and performing the things charged against it. We are of opinion that it is our duty to examine the evidence offered for the purpose stated. See *State of Ohio v. National Cash Register Co.*, 13 Ohio Cir. Ct. R. 73.

It is also urged by counsel for respondent that certain specific conduct of its officers and agents should not be held as binding on the corporation, and much of the evidence is objected to on this ground. It is worthy of note, in this connection, that the man who, for many years, has been president of respondent and its predecessors, was not called as a witness on behalf of respondent, although the evidence is overwhelming that such officer has dictated and controlled the policy of the same since 1886. It is a familiar rule that the acts of officers and agents of a corporation, within the scope of their employment, are the acts of the corporation, and are evidence against it. In fact corporations can only act through officers and agents.

As was said by the supreme court of Missouri in *State v. Packing Co.*, 173 Mo. 356 (73 S. W. 645, 61 L. R. A. 464, 96 Am. St. Rep. 515), in speaking of statements and acts of salesmen and agents of the corporation:

“They were, therefore, statements made by these persons who were employed by the respondents, and who transacted all the respondents’ business of selling in this State, were made while so engaged, and related to the business being transacted. They were, therefore, statements of agents touching the business of the principal then being transacted by such agents, and such agents were the only representatives of the respondents that the buying public ever saw or dealt with. They quoted the prices to the public. * * * They delivered the goods and collected the bills. They were, therefore, statements made by the authorized representatives of the respondents, while in the transaction of their business and touching the business. They were, therefore, admissible in evidence and were just as binding upon the respondents as if those state-

ments had been made by the highest officer of the company, or had been solemnly adopted by the directors or stockholders of the company and entered on the minutes of their meeting" (citing many cases).

Until about the year 1908 the respondent issued a publication known as the "N. C. R." The testimony is undisputed that this publication was not only authorized, but was under the direct management and control of the corporation, and especially its president. In this publication, under date of May 22, 1890, the following appears:

"We propose hereafter to set aside, say, \$5 on each register made, for knockout expense fund to be devoted to maintain a monopoly. It will amount to about \$200 per day."

Under date of April 30, 1890, an article appeared entitled:

"To Our Agents. Reasons why monopolists can pay good salaries and hire the best men.

"We have been called monopolizers of the cash register business. If by monopolists they mean that we are the only manufacturers of cash registers, and that we do not intend to permit any company to be established and reap a harvest where we have sown, then we are monopolists and will uphold the title. By fighting opposition and forcing them down by legal right we can maintain prices that are consistent with the finest class of workmanship. * * *

"The monopolists can give these guaranties. There is but one Standard Oil Company; there is but one Armour; but one Pennsylvania Railroad; but one Western Union Telegraph Company. These corporations control the market, yet do not do it at the expense of the consumer. Their prices are like ours, consistent with the class of goods and service they give. That monopolists are the very best possible concerns to be associated with is a fact beyond dispute. * * *

"That we mean to be the only manufacturers in our business we have shown by our legal fights for

our rights. We have the patents and the organization—the U. S. laws will do the rest.”

It is in evidence that one of the president’s expressions at the conventions was:

“The proper way to kill a dog is not to start at his tail, but cut his head off. You could not kill a tree by picking the leaves off, the proper way is to chop it down.”

In the publication of February 2, 1891, appeared the following article, signed “J. H. P.” which meant John H. Patterson, president of the respondent company:

“Prices of the registers must be kept up by knocking competitors down. Hereafter my whole time will be devoted to this business exclusively. I have arranged shelves in my office to hold samples of all models which were upstairs in our model room, also models of our new registers and knockers. These models have all been put in working order and make such a formidable array as to discourage any company from embarking in the business.

“We invite all capitalists who are thinking seriously of embarking in the cash register business to come to our factory, and they will be shown through our plant from cellar to garret. We will endeavor to convince them that it will not pay them to go into the business, in the same way that we lately convinced a committee of the New Brunswick Board of Trade, whom we showed our No. 9 was a better machine for bars than the Standard. We placed the two side by side. We showed that we could take off several of the advantages of our No. 9, make it operate with two or three motions, and it would still be better than the Standard, and we could afford to sell it for less money than the Standard, and would do so. We showed them that our detail No. 3 and No. 4 and our total adding store, No. 10, were all better than the Standard for store use; that we could take off certain automatic arrangements and do the same work with three or four motions, thus making knockers out of them, and that we could afford to sell them for much less than the

Standard asked for their register, and would do so. This showing completely nonplussed them. One of the committee, Mr. Johnson, is worth over two millions, and has a factory as large as ours."

Under date of January 31, 1891, appeared the following:

"We send greetings and pledge ourselves to fight the opposition to the death wherever it appears in this territory."

Signed by John T. Watson and eight other agents whose headquarters appeared to be in Baltimore or Washington.

Under date of April 1, 1890, in said publication appeared the following article headed "We Ask No Quarter," and it was also headed with a black flag with a white cross in the center. It is as follows:

"In this fight against competition for our bread and butter we will never ask for or give any quarter. It is a fight to the death. We make it a personal matter, and would feel more like speaking to a man who had knocked us down than we would to some of the parties who are endeavoring to injure us. Therefore we make the fight against competition a personal affair. We wish our agents would do the same. We think self-respect demands it. We would not speak to an agent of competitors.

"We ask you not to recognize as gentlemen in any way the agents of opposition companies. They, we believe, are illegally trying to get our property away from us. Our patents and our system are as much our property as a farmer's sheaf of wheat. Before we will give it up we will be whipped. We ask you to make all competition fierce and bitter, as much so as if you were getting hit in the face with a fist."

Under date of October 4, 1890, appeared the following entitled:

"TO THE AGENTS.

"We have opened a fight against the Lamson Co. Keep us posted on all matters regarding Lamson's

agents and their movements. We are getting out some special advertising matter for this war. If you need any of it in your territory, let us know and we will send you some.

"The most valuable weapon for this fight at present are testimonials from parties who have used the Lamson machine, replacing them with Nationals, setting forth the superiority of the National over the Lamson. If you know of any parties who have made such exchanges go at once and get good, strong testimonials from them. Mail them to us. This is to be a hard fight, and if I have your hearty co-operation I feel sure it will be a short fight." Signed by Jos. H. Crane.

Joseph H. Crane, the evidence shows, was a sales agent.

The following letter, signed by J. A. Nelson, who was a sales agent at the agency of Harry Blood, the Chicago agent of the respondent, is headed:

"A LAMSON KNOCK OUT.

"CHICAGO, ILL., Aug. 27, 1890.

"The National Cash Register Co.

"On my return I found Mr. Shaw representing the Lamson Cash Register Company. He is located at No. 85 Dearborn street, in the same office occupied by the Lamson Carrier System. They have samples of all their machines. I heard Monday afternoon that they had sold a machine on Clark street. I found the place and had a long talk with the purchaser. We went over the register in detail, and he then handed me the Lamson circular, with flaming red letters reading 'Solid Shot,' which doubtless you have seen. I knocked out this register and had the pleasure of sending it back to the Lamson office. I then called on Mr. Shaw to see how things looked. I informed him of what I had done, and he turned whiter than a sheet. To have the first machine he had put out in Chicago knocked out took the wind out of his sails somewhat. We will do the best we can until Mr. Blood's return when we will try to knock out every machine they put in. When I left the office my last remark to Mr. Shaw was, 'Ben, if you want \$5.00 you

can get it from me; but if you ever try to sell a register in Chicago I will pester you.'

"Yours truly,

"J. A. NELSON."

Under date of March 1, 1895, appears the following under the title "Then And Now."

"On June 24, 1892, the Boston Company issued a circular a portion of which we quote:

"You may expect to be bulldozed by the representative of the National Cash Register Company, of Dayton, Ohio, in your city, who will call upon you and recite his catechism something as follows: "That the National Cash Register Company created the cash register business and practically owns it; that no one else has any rights; that they do not intend to let any other company live; that he, the agent, does not want to do any dirty business behind your back, and therefore comes to you to tell you that he proposes to knock out every register that you may place, and close up your business. No matter how much money you have to invest, it will make no difference; and much more in the same strain." This has been repeated substantially to all our representatives from Maine to the Pacific Ocean.'

"That's right. We did say it, and our claims have turned out to be true in every respect. How much better it would have been for them if they had paid attention to our agent's catechism."

Under date of May 1, 1892, appeared in said publication the following:

"The more opposition registers put on the market, the more we will knock out. Whenever I hear of a new machine, it don't scare me, because I know that we are able to duplicate it, to put a knocker on it—a better register at a less price, and in that way to discourage and kill it." Signed by F. J. Patterson, who was at that time vice president of the respondent.

Also the following, signed by J. H. Crane, managing director and sales agent:

"In knocking out an opposition register by the use of a 'knocker' it is desirable to accomplish one of three results. The first and best thing to do, of course, is to knock it out before it gets into use. The next is

to disgust the purchaser in order that he will send it back to the manufacturer and buy one of our regular registers, or to so disgust him with the opposition register, that he will send it back to the maker and not buy anything. As a last resort, knock out his opposition register and sell him a knocker. The last is the least desirable victory to be achieved, but we would rather have you do that than not to knock out the opposition register at all."

Also the following in the same publication:

"I presume that there are about fourteen or fifteen different styles of registers in an embryo state, waiting to come upon the market. When they appear we will jump onto them and knock them out.

"JOHN H. PATTERSON."

In the same publication appeared the following:

"One opposition company said lately that if we whipped out the Bensinger Company we could whip out any company that might oppose us. There was, therefore, no hope for their company, because if we did not buy out Bensinger, we would not buy out any concern. We are reliably informed that Bensinger lost \$67,000 in this business.

"It is only a question of whether we propose to spend the money to keep down opposition. If we continue, it is absolutely certain that no opposition company can stand against this company and its agents. If necessary, we will spend five times as much money as we have already done, in order to down opposition. If they really believe this 'they will throw up the sponge and quit.' We are receiving overtures to buy out opposition. We will not buy them out. We do not buy out; we knock out.

"General Butler said to us, four years ago, that we had an unusually fine prospect. 'The only way to make money out of it,' said he, 'is to fight. If you get whipped in one court, carry it to a higher court, and if you get whipped finally in the Superior Court, commence all over again in a new case and fight. Never compromise and never buy out. It is more expensive, probably for a year or two, to fight, but as soon as the opposition know that you will fight at

every point, regardless of the money it takes, they will let you alone.'

"General Butler was prominent in war, politics, business and law. We have taken his advice, and propose standing by it, if it takes every dollar we have."

Under date of May 15, 1892, appeared the following in said publication:

"OPPOSITION COMPANIES.

"Since The National Cash Register Company started in business, it has had sixty-three opposition companies with which to contend. While most of these companies are now out of business, they were at one time actively engaged; and the competition with them was exceedingly fierce. The victory was won only by hard fighting and the display of an unlimited amount of skill in attacking these companies. Many of them were wealthy corporations, while others struggled along hoping to sell their registers on their merits. It is estimated that over \$3,000,000 have been lost by these opposition companies, and, while a few of them are yet in existence, none of them are making money."

In their display window in the agency of respondent in Detroit there were displayed quite a number of Hallwood machines with a placard on some "We sell these registers at thirty cents on the dollar." Sometimes this display would be made up of Hallwood machines, and sometimes respondent's machines would be exhibited alongside of the Hallwood registers.

It appeared in evidence that at the convention of its agents and managers, held at Dayton, Ohio, at the factory of respondent, on July 22, 1907, the following language of the president appeared as a part of the proceedings:

"What this factory is today is not due to any one man, but it is due to all of us. I want to tell you what a satisfaction and pleasure it is to me now to have conceived ten years ago what this factory would be if we kept down competition, and to realize now

how near we are to being a model factory. * * * We want Mr. Anderson of the competition department to give you a little idea of how we are going to control competition. We want Mr. Hayward also to give you a little talk. We want Mr. Muzzy to tell you how we are going to absolutely control the competition of the world because we want you to feel this way. The first thing that we aim to do is to keep down competition. We are getting things here at the factory in good shape. Practically all of my time has been given to competition, more largely on the other side where we have been threatened by brains and millions of dollars; I was over there last year and had very good success in meeting this competition. * * * Now with competition practically out of the way—with no labor unionisms, no more power here in this factory—(we have gotten rid of the worst of it) now we have time and willingness and desire to help the selling force. * * * We have been through the recording force and are now ready to assist the selling force, not particularly in competition; but we must keep that down. We want to assist you in fighting the ignorance of the probable purchaser. That is what we have to fight now."

It is not surprising that these teachings brought about the results testified to. Much more testimony of extravagant statements made by the president and other officers and agents of the respondent might be given here, but it would extend this opinion to unreasonable length.

There was evidence of employment, especially at Columbus, Ohio, by the respondent, of a person whose duty it was to watch the shipments of the Hallwood Company, a competing manufacturer, and report same to the respondent. There was also evidence that the respondent carried upon its pay roll one Ellingwood, who was acting as bookkeeper for the Foss Novelty Company, a competing company, and that this employee furnished inside information to the respondent with reference to the business of said rival company. The use of the knockout card, so-called, was

testified to by one of the respondent's witnesses, and it appeared that the agent got credit for a "knock out" whether he sold one of respondent's machines or not. This knockout card, known also as the "red card," contained the following:

Q. * * * "The red card should be filled out for every opposition register knocked out, whether a National replaces it or not."

The witness answered:

"That explains it.

"Q. Then it is your recollection that the agent got credit for a knock out whether he succeeded in selling a National or not?

"A. Yes, that is all explained in the exhibit there.

"Q. You said in your direct examination that that system, in some form or other, was kept up to the time you left?

"A. Well, I said that the system of reporting work in the field was kept up to the time I left; later, on cards by daily reports. * * *

"Q. If you knocked out the sale of a competition register and did not succeed in selling a National in its place, the agent did not get anything?

"A. Yes, I think he got this bonus, because he had spent a great deal of time on that work."

Respondent's witness Cherry testified, on cross-examination, to the manner in which the selling agents in competing companies were followed while about their work. This man was still in the employment of the respondent at the time he testified. When asked how he found out where the agents of competing companies were going, he testified that he had friends and acquaintances in his territory that were interested in him and his business, and they would tell him of cash register men being in certain localities on their trips.

"Q. How did you find out they were going there?

"A. In the same manner.

"Q. Your friends in that locality would find out that they were going there and let you know?

"A. In a few cases, yes.

"Q. When you found that they were going you sent your men on ahead?

"A. Not necessarily ahead; I sent them out as soon as I could conveniently arrange for them to go there.

"Q. It always happened it was convenient for you to send them the same day that they were going?

"A. No.

"Q. Very frequently happened?

"A. It happened occasionally, yes.

"Q. Isn't it true you tried to make it happen that way whenever you knew they were going?

"A. If conditions warranted, yes. * * *

"Q. Whenever you knew about it and you knew they were going you made it a point to have your men go there too?

"A. Yes, sir.

"Q. As a matter of fact that was your policy during all of the time they were in business?

"A. Yes, sir.

"Q. And that is the policy of the National Cash Register Company, isn't it?

"A. I don't know.

Speaking of unfair competition, Nims on Unfair Business Competition, § 9, says:

"All this law of unfair competition might seem to have the effect of limiting the rights enjoyed by all men to trade freely with each other. But the restrictions imposed by it are not imposed upon traders alone, but equally on all other citizens. The right to trade is not an absolute right, but a qualified one. Whether a man be a trader or not he is not justified in damaging another's business or profession by fraudulent methods, by threats, interference with contract, libel or slander of goods, obstruction or unfair methods of any sort. It is the policy of the law to encourage fair trade in every way."

In the case of *Angle v. Railway Co.*, 151 U. S. 1 (14 Sup. Ct. 240), that court said: An actionable wrong is committed by one who—

"Maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer."

The doctrine is summarized by Nims at section 182:

"From the foregoing, it will be seen that one who interferes in a transaction between other persons who are about to enter into, or are already under contract obligation to each other, may often, not always, be held for damages or enjoined. The cases mentioned above do not include the class of cases most closely related to unfair competition as the term is usually understood. They have been discussed because they serve to illustrate various applications of this principle which is now under such frequent discussion."

The doctrine seems to be that there are at least two ways of interfering with contracts made by other persons: (a) By preventing a contract being made; (b) by causing the parties to break it after it is made.

Mr. Bigelow claims that to make a *prima facie* cause of action for procuring one person not to contract with another, three things must be shown: (1) Notice to the defendant of the plaintiff's relation to the third person; (2) interference with that relation; (3) damage.

In *Temperton v. Russell* (1893), 1 Q. B. 715-728, it was urged that a distinction exists between inducing a breach of the contract already entered into and inducing persons not to enter into contracts, but the court refused to sustain it, saying that the same wrongful intent existed in both cases and the same sort of injury to the plaintiff.

Gregory v. Duke of Brunswick, 6 M. & G. 953, was cited as sustaining the rule that acts which prevent contracts being made are actionable. Many cases might be cited as pertinent to this question, among them *Beekman v. Marsters*, 195 Mass. 205 (80 N. E. 817, 11 L. R. A. [N. S.] 201, 122 Am. St. Rep. 232, 11 Am. & Eng. Ann. Cas. 332).

There are many ways, other than by interference with contract, of harassing, interfering with, and obstructing a competitor in such a manner as to amount to unfair competition, in the broadest sense of the term. The business of another may be unlawfully obtained by harassing his customers and salesmen, just as effectively as by passing off his goods as those of another. *Sperry & Hutchinson Co. v. Weber & Co.* (C. C.), 161 Fed. 219.

The authorities speak especially of interference with salesmen of a competitor. *Evenson v. Spaulding*, 150 Fed. 517, 82 C. C. A. 263 (9 L. R. A. [N. S.] 904). Spaulding manufactured buggies and wagons in Iowa and sold them, through itinerant salesmen, to farmers and others in the State of Washington. A voluntary association, composed principally of dealers in hardware and farming implements in the State of Washington, existed, the object of which was to induce farmers and others to limit their trade to dealers within the State. This association employed agents to follow closely Spaulding's salesmen, to interrupt their conversations with farmers, and dissuade the latter, by false statements and otherwise, from buying Spaulding's goods, and in various ways to intimidate and interfere with the salesmen. The agents of the association very rarely offered any buggies or wagons for sale, and hardly any of the members of the association dealt in buggies. This was held an unwarranted attempt to destroy complainant's business, and an injunction *pendente lite* was granted.

An injunction was issued against the Standard Oil Company, in 1904, because of very similar conduct on its part. *Standard Oil Co. v. Doyle*, 118 Ky. 662 (82 S. W. 271, 111 Am. St. Rep. 331). Its agents attempted to ruin the business of one Doyle by making false representations to his customers, and by threats and intimidations. It also harassed his employees by

following and interfering with them, and offering his customers oil at a lower rate, or for nothing.

There may be also interference by bringing a multiplicity of suits. The bringing of a multiplicity of suits, started not in good faith, but for the purpose of deterring the public from purchasing from a rival and ruining his trade, was enjoined in Wisconsin. Where a large number of infringement suits were brought, the prosecution of them was restrained until the questions involved had been determined in the principal suit, the object of the multiplicity of suits being found to be to harass a rival manufacturer and destroy his business. Quarles, D. J., said:

"Instances are not wanting where patentees make illicit use of the courts as instrumentalities of oppression; bring a multiplicity of suits, purposely scattered through the circuits, not for the honest purpose of securing an adjudication in support of the patent, but to crush a rival manufacturer by creating a stampede among his customers; alarming them by circulars breathing threats of prosecution, denouncing the product of the rival concern as an infringing device, at the same time taking no step to bring any of the numerous suits to final hearing." *Commercial Acetylene Co. v. Lighting Co.* (C. C.), 152 Fed. 642.

There is no question that it is lawful and proper for the owner of a patent to give a notice of infringement of his patent to any infringer thereof, or to any user of an infringing article. It is also his legal right to bring and prosecute a proper suit to restrain an infringer or user, and he may bring and prosecute a suit for recovery of damages against an infringer or user. Such suit, however, must be honestly brought and prosecuted in good faith, and not commenced and prosecuted to harass, annoy, intimidate, financially embarrass, and drive out of business a competitor, for such acts and conduct would amount to unlawful and unfair competition. In most instances, where suits were brought, as shown in this record, they were not

prosecuted to judgment, and in many instances, under the testimony, we are satisfied that suits were brought for the purpose of intimidating, harassing, and financially embarrassing competitors for the purpose of driving them out of business. Respondent's foundation patents had already expired when suits were brought, in many instances.

The evidence above quoted and referred to shows the policy, intent, and purpose of the respondent; and, while it probably is true, as claimed by respondent, that some of the unlawful and objectionable means resorted to by respondent and its predecessor, at an early day, have of late been modified or discontinued, we are not satisfied that its policy has been changed, but that the occasion for the use of such means no longer exists, for the reason that most of the competition has been, by respondent, driven from the field. As showing recent conduct and practices of respondent, we refer to the testimony of Carl S. Heyne, Chas. G. McDonough, Henry F. James, Wm. R. James, Wm. H. Webster, and the cross-examination of Richard B. Cherry and John F. Le Brou. It is objected that much of this testimony consisted of generalities and hearsay. Eliminating such testimony, much remains of specific acts and conduct which is not met or overcome, in our opinion, by respondent.

It is also urged that competitors have resorted to like extreme measures. While this may have been the occasion of respondent's conduct, it is no justification of it. We are here dealing with respondent. As tending to show that its present competitive conditions are unobjectionable, respondent offered in evidence a letter of the vice president and manager, which reads as follows:

"NEW YORK, April 1st, 1909.

"TO ALL DISTRICT MANAGERS:

"Mr. C. A. Snyder:

"In the various conventions I have attended I find

that some of the newer members in the districts are not thoroughly clear on the best way to handle sales made by other companies. Please see that every agent in your district thoroughly understands our position in the matter.

"You know what this policy is, but in brief will say that in no case will we permit any of our agents to misrepresent cash registers manufactured by other companies, neither will we permit any agent or person in our employ to induce any purchaser of a cash register made by any other company, to break his contract and return his register to the manufacturer. With the line of registers that our agents now have, they are able to show superiority of Nationals over those of any other make, and at lower prices.

"There has been no violation of our policies that I know of, but I give you this information because of the inquiries received from the newer men in the field.

"Please see that these instructions are carried out in every detail, and that the new men are so instructed on entering the field.

"Yours truly,

"WM. PFLUM,

"Vice President and Manager."

Without intending to intimate that this letter was not written in good faith, it is significant that at that late day it became necessary to write such a letter at all. The writer of the letter was not called to testify as to the occasion of it, and the evidence is not clear as to the extent of its promulgation. There was much evidence of subsequent conduct of salesmen along the old lines of objectionable practice, but not to the same degree, as at an earlier date.

The conclusion is irresistible that the respondent is guilty of a violation of section 4 of the act of 1905, above set forth. The motion to set aside the order granting leave to file the information is denied.

This leaves only the question of punishment. The punishment to be imposed, in our opinion, under the statute, rests in the sound discretion of the court as between an ouster and a fine. It need not be neces-

sarily a general judgment of ouster, as is contended for by counsel for the prosecution. It may be an ouster of the right to do the particular act complained of, *i. e.*, the purpose and intent of establishing and maintaining a monopoly. It will be noted that the articles of incorporation of respondent do not disclose any purpose or intention of doing an unlawful business. A lawful business might and may be carried on under such articles. This information was filed under our general statute (chapter 275, 3 Comp. Laws), relating to informations in the nature of quo warranto, in which chapter is found section 9961, 3 Comp. Laws (5 How. Stat. [2d Ed.] § 14076), which reads as follows:

“Whenever it shall be found or adjudged that any corporation against which an information in the nature of a quo warranto shall have been filed, has, by any misuser, nonuser or surrender, forfeited its corporate rights, privileges and franchises, judgment shall be rendered that such corporation be ousted and altogether excluded from such corporate rights, privileges and franchises, and that the said corporation be dissolved; or, in lieu of such judgment (except in case of such surrender), the court may impose a fine not exceeding ten thousand dollars upon said corporation; but such fine shall not prevent further prosecution for any continuance or repetition of the conduct complained of, to be had on like leave of the court first had and obtained.”

The judgment might be a suspension judgment of ouster with a fine; or it might be a simple fine. In short, the judgment rests in the sound discretion of the court, as above indicated. See *State v. Packing Co.*, *supra*, 173 Mo. at pages 392-393 (73 S. W. 645, 61 L. R. A. 464, 96 Am. St. Rep. 515), and numerous cases there cited. 5 Thompson on Corporations (2d Ed.), § 5824. 32 Cyc. p. 1464.

Under the circumstances, it appearing that respondent's articles of association authorize and provide for

a lawful business, and that it has offended by acts of misuser; and, it also appearing that between 17,000 and 18,000 machines of respondent's manufacture are in use in this State by between 13,000 and 14,000 individual purchasers, which users and purchasers might be greatly injured in their ability to obtain repairs and new parts to keep up machines, in case of a judgment of absolute ouster, in our opinion a judgment of absolute ouster is not necessary, but that the ends of justice will be satisfied by the imposition of a substantial fine, and the payment of the costs in the case. It is accordingly ordered that the respondent pay to the clerk of this court within 60 days from this date, the sum of \$10,000 as a fine, and also the costs in this case to be taxed. In case the respondent fails to pay said fine and costs within said time, it is ordered that said respondent be ousted of all rights, privileges, and franchises of every nature and kind conferred upon it by the laws of this State, and be forever prohibited from doing business in this State; and any permission or authority heretofore obtained by said respondent to do business in this State is, in the event of default or failure of such payment, declared to be illegal and void. A judgment will be entered accordingly.

MCALVAY, C. J., and BROOKE, OSTRANDER, MOORE, and STEERE, JJ., concurred. KUHN and BIRD, JJ., did not sit.

HARTZ v. HILSENDEGEN.

1. REFORMATION OF INSTRUMENTS—MISTAKE—MUTUALITY.

Only in case of a mutual mistake will equity reform a written lease of real property.

2. SAME—ESTATES OF DECEDENTS—LANDLORD AND TENANT.

Held, that no mistake was established by the evidence, showing that complainant's written lease was executed by the widow of the deceased owner, in her name, and not as or for the heirs or in behalf of the estate of decedent, as averred in complainant's bill to reform the writing.

3. SAME—LIFE TENANT—LEASE—AGENCY.

Where, after the discharge of the administrators of an estate, the widow of decedent assumed to administer the property, claiming a life interest in the real estate under the will, and in her own name executed a lease of certain business property for ten years, the heirs having a remainder interest could not be held to have bound themselves, and the lease terminated at her death.

4. SAME—EVIDENCE—CONTRACTS.

Evidence considered, and *held*, not to show that the heirs entered into an arrangement to pool their interests with that of the widow, or that the heirs ratified or confirmed the lease as affecting their remainder.

5. SAME—ESTOPPEL—ESTATES OF DECEDENTS.

Such remaindermen and heirs were not estopped to treat said lease as at an end, upon the death of the life tenant who executed it, where they never did anything to induce the lessee to believe that they were parties to the agreement, or were bound by it.

6. SAME—RATIFICATION OF LEASE.

In the absence of testimony that the heirs intended to confirm the execution of a lease by the widow of deceased, or that she claimed to be acting for them, the doctrine of ratification could not apply.

7. SAME—EQUITY—MERGER.

Equity will not enforce strictly the legal rule of merger, but will prevent or permit a merger of estates according to the
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actual or just intent of the parties, as it may be expressed or implied.

8. SAME—PURCHASER IN GOOD FAITH—DEEDS—INCUMBRANCES.

Whether or not the purchaser of the premises took title in good faith without notice of defendants' lease, he obtained all the title which the remaindermen were entitled to claim by force of their deed of the premises executed immediately after the widow's death, and he could enforce any rights which they had.

Appeal from Wayne; Van Zile, J. Submitted June 8, 1914. (Docket No. 36.) Decided July 25, 1914.

Bill by John C. Hartz against Louis Hilsendegen and others for reformation of a lease. From a decree for defendants, complainant appeals. Affirmed.

Sloman & Sloman, for complainant.

W. W. Wicker, for defendant Mintz.

William G. Fitzpatrick, for defendant Hilsendegen and others.

STONE, J. The bill of complaint in this cause was filed for the purpose of obtaining a decree to reform a certain lease bearing date March 25, 1905, between Elizabeth Hilsendegen of the first part and John C. Hartz of the second part, purporting to let and lease certain store premises in the city of Detroit to said Hartz for the term of ten years from and after the 1st day of May, 1905, so as to disclose the real lessors thereof to be the estate of Valentine Hilsendegen, deceased, and to be for the use and benefit of the widow, said Elizabeth Hilsendegen, and the residuary legatees, Louis Hilsendegen, George Hilsendegen, and Christine Parsons, under the last will and testament of said Valentine Hilsendegen, deceased; or failing in that, that the court decree that the widow, heirs, and legatees aforesaid and Samuel Mintz, their grantee, have so dealt in relation thereto, and treated it as an

existing agreement and obligation of the estate of said Valentine Hilsendegen, for the full period set forth; that they are estopped from claiming that said lease terminated upon the death of said Elizabeth Hilsendegen; and that the court decree that said lease is a valid agreement and continues in full force and effect during the term therein set forth so long as complainant observes and performs his agreements and obligations thereunder.

A careful examination of the record has satisfied us that the learned circuit judge who heard the case at the circuit found the facts and reached his conclusions therefrom correctly; and we here adopt his findings from the evidence as follows:

"That the property and property rights involved in this contention belonged, in his lifetime, to Valentine Hilsendegen.

"On the 4th day of June, 1887, Valentine Hilsendegen made and executed his last will and testament, by which he devised and bequeathed his property, including the property in question, to his three children, George, Louis, and Christine, leaving to his wife, Elizabeth, her legal and statutory rights in the same.

"On the 16th day of December of the same year (1887) he added to his will a codicil, which is in the following language: 'I, Valentine Hilsendegen, of the city of Detroit, Michigan, being of sound mind, do hereby make and execute this, my codicil to my last will bearing date the fourth day of June, A. D. 1887, and hereby change and vary the provisions of my said will in the following particulars: I will and bequeath to my wife, Elizabeth Hilsendegen, during her life, after the payment of all my debts, accruing interest, taxes, etc., all the income and revenue of my estate, to be used and disposed of by her for her support, as she shall wish and direct. In witness whereof,' etc.

"Valentine Hilsendegen died April 3, 1888. The will was probated. His two sons, George and Louis, were appointed administrators, with the will annexed. John B. Corliss, or his firm, Corliss, Leete & Joslyn, were attorneys in the probate court for the estate.

When appointed administrators, the collection of rents, and the looking after the property was turned over to, and attended to by, the said administrators. On petition of the widow, the probate court allowed to Elizabeth, the widow, \$150 per month for her support during the administration of the estate.

"At the time of his death John C. Hartz was occupying the property in question, or a portion of it, and during the administration it is claimed another lease was executed by the administrators; this lease, however, is not in evidence in this case.

"During the administration of the estate, books of account with the estate of Valentine Hilsendegen were kept by the administrator George Hilsendegen, and a system adopted as shown by Exhibit 1 in evidence. Printed checks running from the estate—also receipts—were used.

"The estate was closed, and John B. Corliss was employed as attorney for Elizabeth Hilsendegen, and the administrators turned over to Corliss the books, papers, leases, checkbooks, etc., etc., and he assumed control under the direction of Elizabeth Hilsendegen, who is claimed to be the life tenant of the property in question and other property, of the deceased, by virtue of the codicil of his will.

"Hartz's lease to the property expiring in 1895, a new lease 'Exhibit X,' was made and executed by Elizabeth Hilsendegen to him for ten years, John B. Corliss, as attorney for Elizabeth Hilsendegen, doing the business for her. Hartz held the property under this lease during the ten years this lease ran, Corliss collecting the rents and accounting to Elizabeth Hilsendegen for the same. At the termination of the lease, 'Exhibit X,' in April, 1905, another lease, the lease in question, was made and executed to complainant, John Hartz, by Elizabeth Hilsendegen ('Exhibit A') for a term of ten years. The negotiations for this lease were conducted through John B. Corliss, acting as the attorney of Elizabeth Hilsendegen. Hartz occupied the premises under this lease, and still occupies them. This lease is signed E. Hilsendegen, the same as 'Exhibit X.' Both these leases or copies of them have been in the possession of John Hartz.

"The complainant claims that he supposed that Elizabeth Hilsendegen executed this lease on her own

behalf, and also for the heirs—that is, her three children—but there is no proof of any statement, either oral or written, on the part of any of the Hilsendegen heirs or Elizabeth Hilsendegen to him or any person warranting such a conclusion, and the lease was not executed in a manner that would indicate that she was so acting. All that was said at the time of the execution of the lease, as it is claimed by Hartz, was, in substance, made by him. ‘Oh, she signs the lease, does she?’ and, as he says, Corliss answered, ‘Yes; that is all right,’ or words to that effect.

“Complainant, Hartz, claims that at the time of obtaining the lease in question he could have leased property on Gratiot avenue for a less rental than he was paying, and so represented to Corliss, and that for this reason his rent was cut down from two hundred seventy-five (\$275.00) dollars per month to two hundred fifty (\$250.00) dollars per month; that after the lease was executed he went to Corliss and asked for certain improvements, and then Corliss said he could not do this until he had seen the boys, meaning George and Louis; and that afterwards he said he had seen them and it was agreed to.

“Proofs are adduced by different persons employed to the effect that they dealt with Corliss, and that he paid them. Some of the checks, however, are signed by Elizabeth Hilsendegen. It also appears that for those improvements the rent was increased \$10 per month.

“Checks for the rent were given in the following manner: From August 3, 1895, to April 28, 1900, by John C. Hartz to John B. Corliss, and indorsed largely, but not always, by John B. Corliss, Estate of V. Hilsendegen, or in a few instances V. Hilsendegen Estate of Valentine Hilsendegen, by John B. Corliss, and in some instances John B. Corliss, V. H. Estate. At the end of this period it appears that the heirs made some objection, or at least criticised the giving of checks to John B. Corliss, and the checks from May, 1900, to May, 1905, were given by John Hartz to the estate of V. Hilsendegen, and up to May, 1904, indorsed by using rubber stamp ‘Estate of Valentine Hilsendegen by’ John B. Corliss or Corliss, Andrus & Leete, or Corliss, Leete & Joslyn, and from May, 1904, indorsed by using rubber stamp, ‘Pay Citizens’ Sav-

ings Bank, Detroit, or Order Est. V. Hilsendegen.' From June 16, 1905, to June 1, 1909, checks were made by John C. Hartz to estate V. Hilsendegen, and indorsed by the same rubber stamp last above described. From June 1, 1911, to June 1, 1912, checks were made by 'The Hartz Clothing Co.', and indorsed by last-mentioned rubber stamp. In the accounts that were kept by Mr. Corliss or his firm reference was made to the estate.

"On December 18, 1909, a notice to quit was served upon complainant, Hartz, signed by John B. Corliss, as attorney for Elizabeth Hilsendegen, and John B. Corliss, as attorney for estate of Hilsendegen. Upon this notice was instituted the proceedings to quit, the case finally going to the Supreme Court, reported 165 Michigan, p. 255.

"Some stress is laid upon a letter returning a check to John C. Hartz written December 2, 1909, signed by Corliss, as attorney for E. Hilsendegen and estate V. Hilsendegen. This was written in connection with the proceedings to forfeit the lease, because Hartz had sublet to the Hartz Clothing Company the case referred to as going to the Supreme Court.

"At a time when Elizabeth Hilsendegen and some of the heirs were absent, a power of attorney was given to Corliss and used in a few instances in executing leases and making contracts. Throughout the course of the business of the estate with John B. Corliss, more or less reference was made to the estate of V. Hilsendegen, but it is claimed, and seems probable, that this was done for convenience in keeping it separate from Mr. Corliss' other business with other clients and his own private business; for in 1891 the estate of Valentine Hilsendegen was closed up. The probate court and the records of the court would show that there was no longer any estate of Valentine Hilsendegen. As a matter of fact, Elizabeth Hilsendegen was actively controlling the property and rents, issues and profits of the same from the close of the estate up to the time it was sold. She signed all the leases, except some three that were made while she was absent. She signed checks to pay running expenses of the property, and for repairs and improvements made upon the Hartz property. She directed Mr. Corliss as to the distributing of moneys in

his hands given to the heirs, and Hartz was holding under leases from her for some 18 years. And there was never any authority from her in writing or by parol giving to any person authority to transact the business of leasing, selling, or operating, except to Mr. Corliss.

"With notice that Hartz was occupying the building under lease from Elizabeth Hilsendegen—and all that was of record and all that had transpired with reference to Hartz's right to possession—on the 24th day of June, 1912, defendant Samuel Mintz, having a short time previous contracted for the property, received, duly executed by all the heirs and the widow, Elizabeth Hilsendegen, a deed of the property. While it may be said that he was not in all respects a bona fide holder, in that he knew of Hartz's occupancy, and the notice that that occupancy brought him, and as he testifies knowing that Elizabeth Hilsendegen was a life tenant and her age, he did not have actual knowledge of all the details of the transaction of John B. Corliss. It is a fact that soon after obtaining title he talked with Hartz about Elizabeth Hilsendegen having but a life estate, and at that time, and for some time previous, Hartz had received knowledge of that claim.

"Elizabeth Hilsendegen died January 26, 1913.

"As to Hartz's notice, it must be found, as matter of fact, that he knew that Valentine Hilsendegen died seised of this property; that his estate was probated in the probate court for Wayne county; that the records of that court and the records in the Hilsendegen estate were public and open to his inspection; that the will of Hilsendegen, if he made a will, was there for his inspection, and, if he died intestate, that fact could be discovered by him; that, the will being the public records of the court, he must be held to know its contents, because the records and files of the court are notice to everybody. Not only would the will be of record in the probate court, but it should be of record in the office of the register of deeds for Wayne county.

"Mintz had notice of all this, and therefore knew that Hartz and all persons dealing with the property had notice of those facts.

"There is no proof of actual fraud being exercised

by any one connected with this case in any of the dealings or transactions relating to this property.

"These I find to be the substantial controlling facts in the case."

An examination of the record clearly discloses that there was no mistake of any kind in the making or executing of the lease of 1905. It was between the same parties as its predecessor. There is no evidence to the effect that complainant did not know with whom he was dealing. As matter of fact, complainant knew that he was dealing with Elizabeth Hilsendegen, and the lease so states.

It is not necessary to cite cases to the effect that equity will not reform a written lease for mistake where it does not appear that the mistake was mutual, for in the instant case it does not appear that there was any mistake of fact on the part of either party. We shall not further speak of the subject of reformation of the lease, for the reason that, under the evidence, we are satisfied that neither party ever had any intention of executing it in any other than the precise form in which it was executed.

It is urged in this court that Elizabeth Hilsendegen did not take a life estate under the will of her deceased husband, and that she was not entitled to the possession and control of the property for life. We are unable to see how this position, if correct, can benefit the complainant or help his standing under the evidence. Whether she was strictly a tenant for life or not, it is manifest that, under the terms of the will, all of her interest in the estate ceased at her death. If she had no life estate, under the will, then she could at the most have but a dower interest, which would cease at her death. Neither does it aid complainant's standing to say that the lease was a nullity.

Her lease standing upon its terms certainly did not bind the children, the other legatees. It is very evident that, whatever the interest of Elizabeth Hil-

sendegen was in the estate of her deceased husband, it was handled and treated by her and her children as that of a life tenant, and the children are not here complaining. By the clear weight of the evidence it appears that she, after the discharge of the administrators, took charge and possession of the estate, and by herself and her attorney, Mr. Corliss, administered the affairs to the date of her death. The claim of complainant that there was a pooling of interests by Elizabeth Hilsendegen and her children is not made out by the evidence. The evidence is more consistent with what we have stated, to wit, that after the discharge of the sons as administrators the mother took charge of affairs, and, by herself and her attorney, conducted and administered them, than it is with the claim that there was a pooling arrangement. It clearly appears that the mother and her children understood that she had a life use of the property, with remainder over to them. This view of the case reconciles the entire conduct of the parties. The children were interested in the estate, and it was proper that they should be consulted about the insurance upon it, the exchange of a part of it for other property which was by the mother's consent deeded to the children severally, and it was not strange that she from time to time gave or passed over to them sums of money from the estate.

Counsel for complainant have claimed much for the manner in which the accounts were kept after the discharge of the administrators. The most that can be said for this is that it was a mode of bookkeeping adopted by the attorney to keep Mrs. Hilsendegen's affairs separate from his own, or those of his firm. Mr. Corliss was the attorney of the mother, and not of the children. The latter had nothing to do with the bank account, or the manner in which that account was kept. Except when connected with the attempted sale, or the final sale of the property in ques-

tion, Mr. Corliss in no sense acted on behalf of the children or any of them. It is not necessary to say that all were interested in the final sale to Mr. Mintz, and in the prior attempted sale. In no proper sense can it be said that the interest of the mother and the interests of the children were mingled in the making of the lease in question, or in handling the proceeds of the lease. Is this a case where the doctrine of an estoppel *in pais* should apply as against the children, binding them to the terms of the lease? That they never did or said anything to induce the complainant to believe that they were parties to, or were bound by the lease, is clear from the complainant's own testimony. He claims that Mr. Corliss led him to believe that he was acting for the children. If Mr. Corliss did so represent, which he denies, this would not bind the children.

Complainant testifies that he had no conversation with any of the children relating to the interest of the mother in the estate or property in question. He also testifies that he noticed the way in which the mother signed the lease, and surmised that she might be claiming to be the owner of the property for life. So, aside from the statute of frauds (which would be an insuperable obstacle to the application of the doctrine of an estoppel to a ten-year lease), we are of opinion that there has been nothing in the acts or conduct of the children which could give the complainant the right to invoke the doctrine of an equitable estoppel.

Neither is there any room here for the application of the doctrine of ratification. Not only is there an entire absence of evidence of intention on the part of the children to ratify or confirm any action of the mother in making the lease, but there is no evidence that Mrs. Hilsendegen or Mr. Corliss, her attorney, in writing, or otherwise, ever attempted to bind the children in the making of the lease, or ever claimed

to act for anybody but Elizabeth Hilsendegen in that matter. *Ferris v. Snow*, 130 Mich. 254 (90 N. W. 850); *Heyn v. O'Hagen*, 60 Mich. 150-156 (26 N. W. 861).

Counsel for complainant claim a merger of the interests of Elizabeth Hilsendegen, the life tenant, and the remaindermen, the children, by the conveyance to defendant Mintz, and cite *Ryder v. Flanders*, 30 Mich. 336, in support of that claim. We have held that a court of equity is not bound by the legal rule of merger, but will prevent or permit a merger of estates according to the actual or just intention of the parties, whether expressed or implied. *Ann Arbor Sav. Bank v. Webb*, 56 Mich. 377 (23 N. W. 51); *Quick v. Raymond*, 116 Mich. 15 (74 N. W. 189); *Wettlaufer v. Ames*, 133 Mich. 201 (94 N. W. 950, 103 Am. St. Rep. 449).

The deed to defendant Mintz was made subject to the lease, and we can see no reason why he should not assert all claims and rights, upon the death of Elizabeth Hilsendegen, that the children could assert had the deed not been given. The rule has no application in so far as complainant is concerned, and his rights cannot be enlarged by reason of such deed. It is not necessary to a disposition of the case to inquire whether or not defendant Mintz was a bona fide purchaser. He certainly is entitled, in any view of the case, to any and every defense available to the other defendants.

In our opinion, the circuit court reached the right conclusion, and the decree of the court below is affirmed, with costs.

MCALVAY, C. J., and BROOKE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred. KUHN, J., did not sit.

MINTZ v. HARTZ.

Error to Wayne; Hosmer, J. Submitted January 21, 1914. (Docket No. 60.) Decided July 25, 1914.

Summary proceedings by Samuel Mintz against John C. Hartz, the Hartz Clothing Company, Helen Duncan, and John Doe for the possession of certain real property. From a judgment for defendants, complainant appealed to the circuit court. Judgment for complainant. Defendants bring error. Affirmed.

Sloman & Sloman, for appellants.

W. W. Wicker (*W. G. Fitzpatrick*, of counsel), for appellee.

STONE, J. This case is governed and controlled by that of *Hartz v. Hilsendegen*, ante, 129 (148 N. W. 433). Elizabeth Hilsendegen died January 26, 1913, and thereby her life interest in the property involved was terminated. On January 27, 1913, Mr. Mintz, the purchaser of the property, subject to the lease given by Elizabeth Hilsendegen, served on Mr. Hartz written notice of her death and of termination of tenancy and demanded possession. Thereupon Mr. Hartz, on January 28, 1913, filed his bill of complaint in the chancery case above referred to, and obtained an injunction against summary proceedings, which injunction was kept in force until the bill was dismissed after final hearing on the merits on May 21, 1913. Thereupon Mr. Mintz, by this suit, commenced summary proceedings before a circuit court commissioner. After judgment before that officer the case was appealed to the circuit court, where it was tried,

and a verdict and judgment were directed for the complainant. The defendants appealed to this court. The record discloses that upon the trial of the instant case the attorney for the appellants, in referring to the chancery case, said:

"I am satisfied if the Supreme Court on appeal should hold against us, that this case may be disposed of by that determination, either for or against us; I am perfectly willing to do that."

The chancery case having been here disposed of upon its merits, the questions involved in this case have been thereby determined, and the judgment of the circuit court is affirmed.

MCALVAY, C. J., and BROOKE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred. KUHN, J., did not sit.

LEWIS *v.* DOYLE.

1. DURESS—CONTRACTS—EVIDENCE.

Duress exists where one is induced by the wrongful act of another to make a contract or perform some act under circumstances which prevent his exercising his free will.¹

2. SAME—HUSBAND AND WIFE—MARRIED WOMEN.

A wife may undoubtedly avoid a contract, otherwise valid, made by reason of the threatened criminal prosecution of her husband.

¹ As to contracts procured by threats of prosecution of a relative, see notes in 26 L. R. A. 48; 20 L. R. A. (N. S.) 484, and 37 L. R. A. (N. S.) 539.

3. SAME.

In cases based on alleged duress, the question is whether the complainant acted under the coercion of threats made by the defendant or his employees.

4. SAME—MARRIED WOMEN.

The mere fact that complainant's husband informed her that he had misappropriated money belonging to his employer, and feared he would be forced to go to jail, was not sufficient evidence of duress to avoid conveyances of the complainant to such employer of her husband in satisfaction of the claim.

5. HUSBAND AND WIFE—MARRIED WOMEN—CONTRACTS.

A married woman may convey her property in payment of, or as security for, her husband's debt, and such contract is sustained by sufficient consideration.

McALVAY, C. J., and KUHN and MOORE, JJ., dissenting.

Appeal from Ottawa; Cross, J. Submitted November 4, 1913. (Docket No. 63.) Decided July 25, 1914.

Bill by Dina Lewis against Edward M. Doyle for the cancellation of certain instruments of conveyance. From a decree for complainant, defendant appeals. Reversed.

Jarrett N. Clark, for complainant.

Corie C. Coburn, for defendant.

STONE, J. In this case the complainant filed her bill of complaint to set aside certain instruments, by the terms of which she conveyed her interest in the estate of her deceased father to the defendant.

Complainant, by her bill of complaint, claims that the instruments were procured from her under circumstances which amounted to duress, and for the sole consideration of preventing her husband from being prosecuted for embezzlement, and sent to the penitentiary.

The complainant is the daughter of Jan Van Eene-

naam, and she was married to one William A. Lewis. The complainant and her husband lived in Zeeland, Mich., for a time, and in 1906 went to the State of California because of the ill health of Mr. Lewis, who had consumption. At Riverside, Cal., Mr. Lewis secured employment with the Riverside Steam Laundry Company. He remained in the employ of the said company from June, 1907, to the last of November, 1909, when he was discharged because he had misappropriated some \$1,900 belonging to the company. He had been employed as a driver of one of the wagons of the company, and his duties required him to collect the laundry and deliver the same, and also to collect the money due for the laundry work. The misappropriation was of funds so collected by him.

Upon discovering the shortage, or misappropriation, negotiations were had which resulted in the complainant conveying to the defendant all of her interest in the estate of her deceased father in Michigan, with an agreement back, to pay over to complainant any sum of money which might be received from the property in excess of the sum of \$1,900. A few months prior to the time of the discovery of the misappropriation of the money by Lewis, complainant's father had died in Michigan and left a will by the terms of which complainant had an interest in his estate. A copy of the will had been sent to the complainant. The defendant had been informed that the complainant had inherited some property, and he also knew that Mr. Lewis had no property. Mr. Lewis and defendant talked of a settlement of the shortage, and Mr. Lewis asked that he be given a day or two to arrange for a settlement, and informed the defendant that he desired to talk it over with his wife. Upon this branch of the case the complainant testified as follows:

"While in California, Mr. Lewis at first worked at

a grocery store, and then secured employment from the Riverside Laundry Company, and remained in their employ about three years, until the fall of 1909. That the reason he quit the employ was that Lewis said to complainant, his wife, that he was short in his accounts about \$1,900. He came home on Tuesday; seemed to feel very sad; went into the parlor; sat in the Morris chair. I saw he was crying, and he said Doyle said he was short in his accounts nearly \$1,900, and he said, 'I am out of work.' That was the first time that complainant knew her husband was short in his accounts. That the next day he said he asked to see the books, and that Mr. Doyle refused to show them to him. He said, 'Now, what can you do?' I said, 'Will, I can't do nothing; I have got my two little babies here, and can't do nothing.' He said, 'Something must be done, because I don't want to go to the penitentiary.' * * * Three days later Mr. Lewis came home in the laundry wagon, and it was raining, and he says, 'Now, hurry up and get ready, because Doyle wants us to come to his house;' and I says, 'What does he want us to come there for?' He says, 'He wants to talk to us.' I says, 'I wonder will there be anybody else there;' and he said, 'No, there won't be anybody there but me and my wife.' I was going to change my dress; I just had a dressing jacket on and an old skirt, and I was going to change it. He said, 'Don't get ready; just slip on your coat and go just the way you are. There is no time to waste.' We went down to Mr. Doyle's. Mr. Cathcart was sitting there. Never saw him before. Then Mr. Byrne stepped in from the dining room. Mr. Byrne was a lawyer at San Bernardino. Doyle introduced us to Byrne, saying, 'This is the man who is short in his account.' And then Mr. Lewis produced a copy of the will, which I did not know Mr. Lewis had. Then Mr. Doyle told me, 'You and the children go into the kitchen; Mrs. Doyle is there.' I went and stayed 15 or 20 minutes. The door was closed behind me. I said to Mrs. Doyle, 'I am awfully sorry I have to come on an errand like this. I hope they won't send Mr. Lewis to the penitentiary.' Mrs. Doyle said nothing. After awhile Mr. Doyle came in, and I went into the parlor where the men were. Mr. Byrne read the

will to me and said, 'Now Mrs. Lewis you must sign away your whole inheritance,' and he took that paper, and he hit that like that (indicating) into my face. I thought he was going to slap me with that paper, and he said, 'If you do not sign that paper we will prosecute your husband, and we will send him to the penitentiary. We have no time to bother; you must hurry and sign that paper.' I did not want him to go to the penitentiary. He was a consumptive husband, and I knew he could not live long. I was a total stranger in Riverside; I didn't want Mr. Lewis to go there. * * * He took that paper and just went to me and said, 'Now you shall sign away your inheritance, because we have no time to bother, and you must hurry up and sign.' I says, 'What if you get more than \$1,900?' Then he said, 'What the balance is we will return to you every penny, what the balance is.' And then we came home. I signed the paper there to keep my husband from going to the penitentiary. I believed Mr. Lewis would be prosecuted for taking this \$1,900 unless I signed it. * * *

* A week or ten days later the telephone rang and Mr. Lewis answered the phone and said, 'Doyle wants us to go up to the courthouse and sign a paper.' It was raining hard, and I said, 'Why do we have to go today?' And he said, 'Doyle said we must go today.' We went to the prosecutor's office, and Mr. Lewis took me there, and I signed a paper there; do not know what I signed. I asked no questions and the paper was not read to me. Mr. Evans and Mr. Lewis were in the room when I signed the paper, and I signed that because I thought it would keep him from going to the penitentiary."

It is undisputed that the instrument first signed by complainant was indorsed upon the back of the copy of the will, and was made to Mr. Byrne in trust for the laundry company, until the value and condition of the property in Michigan could be ascertained, with the understanding that, if the property proved satisfactory, a more formal assignment of the claim of complainant would be made to the defendant, Doyle, in trust for the laundry company. The conditions of

the property being satisfactory to the defendant, the instrument of which the complainant speaks as having been made at the prosecutor's office was a formal assignment in the nature of a quitclaim deed, appearing in the record as Exhibit A which appears to have been signed and acknowledged by the complainant and her husband on the 9th day of December, 1909, and the acknowledgment was before Lyman Evans, a notary public, Mr. Evans being the person referred to by the complainant as the prosecutor. He appears to have been the prosecuting attorney of Riverside county.

After a careful reading of this record, we are of opinion that this case should be disposed of upon the facts and the weight of the testimony. The case must turn upon the facts as to what occurred at the home of Mr. Doyle at the time the first instrument was signed. Upon that subject the defendant, Doyle, testified. Both complainant and defendant testified in open court. In support of the testimony of the defendant there were read in evidence the depositions of Mrs. Edward M. Doyle, W. E. Byrne, and Robert Cathcart. Their testimony as to what occurred at the house is in direct conflict with that of the complainant. Mr. Doyle testified that, after the amount was agreed upon which Mr. Lewis owed the laundry company, Lewis suggested that, instead of having a meeting at the office, it should be held elsewhere, and Mr. Doyle suggested that it could be at his house; that this was done because Lewis wanted to keep the matter of his shortage from his friends and the people, and asked Mr. Doyle as a favor to keep that quiet; that there were no threats whatever to arrest Mr. Lewis made at the house; that neither Mr. Doyle nor anybody else said that, if the matter was not settled right up, they would send Lewis to the penitentiary; that the word "penitentiary" was not used, and that

complainant and his wife appeared to be anxious to have the matter settled; that no such language was used by Mr. Byrne or anybody else, as testified to by complainant.

Mrs. Doyle testified that shortly after Thanksgiving, 1909, at her home, she and others had a conversation with complainant; that at this time Mrs. Lewis executed a deed of the property in Michigan to W. E. Byrne, which was read to Mrs. Lewis and her husband before she signed it, and that they also read it themselves; that this deed was written on the back of a copy of the will, because there was no other available paper in the house; that the said instrument was prepared at the request and suggestion of Mrs. Lewis; that complainant said she knew her husband was short in his accounts, and that the money had been used for household expenses; that when complainant and her husband came to witness' house complainant said that they had come to see if they could not make a settlement of the indebtedness of Mr. Lewis to the laundry company, and that they had the means to make such a settlement; that no one said anything to complainant about her husband committing embezzlement, or any other crime, for which he could be prosecuted and sent to the penitentiary; that witness saw Mrs. Lewis during the entire time she was at her home, and heard everything that was said by complainant and by others to her in her presence and hearing; that neither Mr. Byrne nor any one else said to her that she must sign away her inheritance, or sign any paper, or her husband would be prosecuted and sent to the penitentiary; that such language was not used at all by any one; that no one said to her, "Hurry up and sign this; we have no time to waste; you must sign or we will have him sent to the penitentiary," or words to that effect, or anything of the kind; that nothing was said in her presence

and hearing to the effect that unless Mr. Lewis' shortage was settled that he would or could be arrested, and criminally prosecuted; that at one time the witness and the complainant left the room, and complainant said to her that she was sorry that this had happened, and she would pay every cent back if it took all she had, and that it was very kind of Mr. Doyle to accept the settlement; that the complainant, while at the house, did not appear worried or afraid; that no one said or caused anything to be done which would cause complainant to be frightened or worried; that no one made any threats or attempted to persuade or coerce complainant or her husband to sign the paper; that Mr. Byrne took the paper in his name at the request of complainant, and was to hold the same until investigation was made of the Michigan property, and that, if Mr. Doyle decided to accept the Michigan property in settlement of Mr. Lewis' indebtedness, then Mrs. Lewis was to deed the property to him for the laundry company, and that Mr. Doyle should pay Mrs. Lewis all that he received over \$1,900 from the sale of the property; that the matter of deeding was fully discussed in the presence of complainant, and that she and her husband both did the talking; that complainant talked with her husband, and thoroughly understood the matter, and was perfectly satisfied.

This testimony of Mrs. Doyle is fully corroborated by the testimony of Robert Cathcart and W. E. Byrne. The deposition of Lyman Evans was also read to the effect that, according to his recollection, Mr. and Mrs. Lewis signed the deed in his presence on December 9, 1909; that he asked her if she fully understood the purpose, nature, and effect of the instrument before he took her acknowledgment; that, while he had no distinct recollection in this case, it was his custom to do this in all cases.

It further appears that in the fall of 1910 Lewis was arrested upon another charge of obtaining money under false pretenses or forgery, and was released on probation, and died in July, 1911.

In September, 1910, Mr. Clark, of Zeeland, Mich., wrote to complainant in behalf of the administrator of her father's estate, and with reference to the transfer of her interest to the defendant. On the 19th of that month complainant wrote to Mr. Clark in reply, stating that she did not sign over to defendant her entire share of the estate, but had given him a power of attorney to collect \$1,900, which represented the amount of money he had loaned to her and her husband. Mrs. Lewis, in her testimony, claims that this letter had been prepared by her husband, and that she had been induced by him to sign and send it, but that it did not represent the facts. Later, and in the month of May, 1911, a paper had been received by Mrs. Lewis which was in the form of a petition to the probate court of Ottawa county, Mich., consenting to an immediate division and distribution of the estate, and waiving a clause which gave her and her sister a five-year use of the income of a certain portion of the estate. As a part of that paper, there was a statement prepared to be signed by defendant, as assignee of all the interest of the complainant in the estate, consenting to the relinquishment of all the rights of Mrs. Lewis in that clause of the will above referred to. This instrument Mr. Doyle declined to sign until he could know more definitely about the amount that would be realized from the estate. On the 8th day of May, 1911, an agreement was entered into between the heirs and legatees of this estate, which had been signed by Dina Lewis and other heirs, which contained, among other things, this clause:

"All the other heirs, legatees, and devisees agree to pay to the said Christina Elgersma (her sister), and

Dina Lewis, or her assigns, that amount that would have been paid to them during said five years at the time this estate is closed," etc.

There ought not to be much question about the law governing a case of this nature, under our decisions. Duress exists where one is induced, by another's unlawful act, to make a contract or perform some act under circumstances which prevent his exercising his free will. *Hackley v. Headley*, 45 Mich. 569 (8 N. W. 511); *Knight v. Brown*, 137 Mich. 396 (100 N. W. 602).

Undoubtedly a wife may avoid her contract, otherwise valid, made by reason of the threatened criminal prosecution of her husband. *City Nat. Bank of Dayton v. Kusworm*, 88 Wis. 188 (59 N. W. 564, 26 L. R. A. 48, and note, 43 Am. St. Rep. 880).

In the opinion of the circuit judge, found in the record, is the following:

"It is not necessary to decide whether or not her husband had committed an offense for which he could be sent to the penitentiary. She (complainant) believed that he had, and she conveyed her inheritance to the defendant for the express purpose of saving her husband from going to the penitentiary, and she was compelled to enter into the arrangement for that purpose."

If by the closing language above quoted the circuit judge meant that complainant was compelled, by the defendant, to enter into the arrangement, we cannot agree with him.

The question is one of fact whether the complainant acted under the coercion or threats of the defendant or those employed by him. To justify a court in rescinding a contract on the ground of duress, the testimony should be cogent and the case made out by a clear preponderance. The burden is upon complainant to make her case, and the testimony, as a whole,

ought to be sufficient to overcome the presumption that the contract was freely made, and was one of fair dealing. From a review of the whole record, we are unable to find by any preponderance whatever that the complainant was deprived of the exercise of her free will by any act of the defendant, or anybody in his employ or interest. The most that can be said from the testimony, as a whole, on behalf of the complainant, is that her husband gave her to understand that he was in danger of a criminal prosecution, and that he feared the penitentiary, and didn't want to go there. But, unless the defendant was responsible for this conduct of complainant's husband, her fear, or her husband's fear, in the matter would not operate as such duress as would justify the setting aside of the conveyance.

In the case of *Morse v. Woodworth*, 155 Mass. 233, at page 250 (29 N. E. 525, at page 528), the supreme judicial court of Massachusetts said as follows:

"The rule as to duress *per minas* has now a broader application than formerly. It is founded on the principle that a contract rests on the free and voluntary action of the minds of the parties meeting in an agreement which is to be binding upon them. If an influence is exerted on one of them of such a kind as to overcome his will and compel a formal assent to an undertaking when he does not really agree to it, and so to make that appear to be his act which is not his but another's, imposed on him through fear which deprives him of self-control, there is no contract unless the other deals with him in good faith, in ignorance of the improper influence, and in the belief that he is acting voluntarily."

In *Compton v. Bunker Hill Bank*, 96 Ill. 301 (36 Am. Rep. 147), where the wife executed and acknowledged a deed conveying her land to the bank, whose money her husband had embezzled to a large amount, to save him from arrest and criminal prosecution, and it appeared that the wife was urged to make the con-

veyance by her husband and brother, who informed her that if she would do so the bank would not prosecute, and the bank had no knowledge of any such representations being made to induce the execution of the deed, nor authorized any to be made, and none of its officers had any conversation with the grantor on the subject, it was held that a court of equity would not set aside the deed for fraud, duress or imposition. See, also, *Lefebvre v. Dutruit*, 51 Wis. 326 (8 N. W. 149, 37 Am. Rep. 833), to the same effect.

In this State there can be no doubt of the right and power of a married woman to convey her property in payment of, or security for, her husband's debt, and that such conveyance has a sufficient consideration. *Kieldsen v. Blodgett*, 113 Mich. 655 (72 N. W. 9).

While complainant testifies that she did not know what instrument she signed on the 9th day of December, 1909, yet she says that she supposed that it was to carry out the arrangement made at defendant's house. This is true, and is all that that instrument purported to be. This action was taken by her more than ten days after the first instrument had been signed, and it would seem that there had been sufficient time for her to have considered what she was doing, and to rebut any duress claimed to have been exercised upon her on the first occasion. *Francis v. Hurd*, 113 Mich. 250 (71 N. W. 582).

We have examined the numerous cases cited by counsel for complainant and fully recognize the doctrine which those cases announce, but are of opinion that this case must be disposed of upon the facts and the principle above stated. Not only has the complainant, in our opinion, failed to make out a case for equitable relief by any preponderance of evidence, but the evidence in the case is overwhelming against her to the effect that she acted voluntarily and freely at

the time she executed the two instruments, and that no force, fraud, or duress was exercised by defendant, or by any one with his knowledge.

The circuit court granted the relief prayed for by complainant. We cannot agree with this result. In our opinion, complainant has failed, by the evidence, to make a case entitling her to any relief.

The decree of the circuit court is reversed, and the bill of complaint dismissed, with costs to defendant.

BROOKE, OSTRANDER, BIRD, and STEERE, JJ., concurred with STONE, J.

MCALVAY, C. J. (*dissenting*). The facts in this case are clearly stated in the opinion written by Mr. Justice STONE. There is no question of law presented by this record, and it must be disposed of upon the facts presented by the record. I have read all of the testimony with great care, and after thoughtful consideration I find it impossible to agree with Mr. Justice STONE in his conclusion that the case should be reversed and the bill of complaint dismissed.

The story of this complainant is a simple one. She was a woman of intelligence and character, with some prospect of a small inheritance, who went from Michigan to California to find a better climate for her sick husband who was suffering from tuberculosis, also taking with her two little children. Her husband found employment with a laundry, of which defendant was manager, where most of his time was spent in the open air driving the laundry wagon. This employment continued for about three years, when, about Thanksgiving day, 1909, he was discharged and accused by his employer of having wrongfully appropriated about \$1,900 of the money which had come into his hands by way of collections made in the course of his work. He went to his wife and first informed her that he had lost his employment, and

afterwards made confession to her that he was charged with being short in his accounts. He desired her to help him out, saying that something must be done to keep him out of prison. This she hesitated to do on account of the little children. The defendant knew that the husband was without means, and that the wife, through her father's estate, had inherited some property.

So far there appears to be no dispute upon the facts, and this statement of conditions and the situation is taken from the testimony of complainant, now a widow.

Three days after complainant was told of her husband's wrongdoing she was sent for by the defendant to come to his house with her husband; her understanding, received through her husband, being that there would be no one present except defendant. She was taken there by her husband in defendant's laundry wagon, with defendant's knowledge, and so great was the husband's urgency that, although she desired to change her dress, having on only a dressing jacket and an old skirt, he stated there was no time to waste; "just slip on your coat and go just as you are." Upon arrival at defendant's residence she found defendant, Mr. Cathcart, a stockholder and director in the laundry company, and Mr. Byrne, defendant's attorney, who was introduced to them by defendant, who said: "This is the man who is short in his accounts." Her husband produced a copy of her father's will, which she had no knowledge was in his possession.

To this point her testimony does not appear to be disputed. Her statement of what followed, the threatening attitude of defendant's attorney toward her and what was said and done, as contained in the excerpt from her testimony in the opinion of Mr. Justice STONE, are in sharp dispute. She is contradicted by

the defendant, his attorney and witnesses, all, except defendant's wife, present by appointment. Defendant was the only witness on his part who testified in open court. The testimony of the others was taken by depositions. It is admitted that this meeting resulted in a memorandum in the nature of an assignment of all of her interest in her father's estate to defendant's attorney, Byrne, in trust for the laundry company, written by defendant's attorney upon the back of a copy of her father's will as a preliminary security, with an understanding that, if defendant realized more than \$1,900 from this property, the surplus would be paid to complainant.

Later, after an investigation had been made on the part of the defendant as to the value of this Michigan property, on December 9, 1909, a deed and assignment of all this interest in her father's estate to defendant was made out by defendant's attorney, signed and acknowledged by complainant and her husband, and also a written agreement of the same date was executed by defendant to pay all money realized from the sale of such property received in excess of the sum of \$1,900.

The deed was taken to the office of the prosecuting attorney for Riverside county, Cal., by defendant for execution by complainant and her husband and for acknowledgment before Prosecutor Evans.

There is a monotony of statement in the testimony of defendant and the depositions of his witnesses which does not accord with the ordinary testimony of witnesses who testify independently their individual recollections of facts. Defendant's attorney testifies positively that he went to defendant's house at the time complainant made the assignment of the interest in her father's estate without any knowledge of the subject-matter for which his services were desired; that he had been told nothing about any busi-

ness to be done between defendant and complainant's husband. Defendant as positively testifies that when he made the appointment with his attorney he told him all of the facts in regard to this matter. In defendant's testimony he makes an effort to have it appear that the meeting at his house where he had surrounded himself with these witnesses to observe what occurred when complainant gave away her entire estate to save her husband was like a family gathering.

This opinion has been extended to greater length than was intended. My conclusion is that the testimony of complainant is substantially true. Her husband, evidently a weak, sick man, now dead, had gotten into this difficulty, and complainant in her devotion to him was willing to, and did, sacrifice her entire property. That pressure was brought to bear upon her, sufficient to cause her, under the circumstances, in her sense of fear of what would happen in case she refused, to make this conveyance to defendant to save her husband from prison, is evident. She was not a strong woman physically; and her actions at the time were the natural result of surrounding conditions.

My conclusion is that the learned trial judge, before whom the testimony of the parties to this suit was heard, being the only witnesses to the material facts in this case who were sworn, with his opportunity to judge from their personal appearances, arrived at a correct conclusion, and that the decree which was granted to complainant by the circuit court should be affirmed, with costs of both courts in favor of complainant to be taxed.

KUHN and MOORE, JJ., concurred with MCALVAY, C. J.

ADAMS v. ACME WHITE LEAD & COLOR WORKS.

1. ACCIDENT—DEFINITION—MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—POISONING.

An accident is an unforeseen event, occurring without the design or will of the person whose act causes it; it partakes of the nature of an unexpected or unusual occurrence, brought about by some unknown cause, and involving something fortuitous or unexpected; or, if the cause is known, having an unprecedented consequence.

2. MASTER AND SERVANT—ACCIDENT—PERSONAL INJURIES.

Under the provisions of the workmen's compensation act, no recovery may be allowed for occupational diseases such as lead poisoning, which, being gradually acquired, is outside the scope of the requirement that notice is to be given within ten days after an accident, and of the title and terms of the statute as to compensating accidental injuries. Act No. 10, Pub. Acts Extra Session 1912 (2 How. Stat. [2d Ed.] § 3939 *et seq.*).

3. SAME—CONSTITUTIONAL LAW—TITLE OF STATUTE.

If the act was intended to include such occupational diseases, the title was not broad enough to express that object within Art. 5, § 21, of the Constitution.

Certiorari to the industrial accident board to review an award of compensation to Sarah E. Adams against the Acme White Lead & Color Works for the death of claimant's husband. Defendant brings certiorari. Submitted April 15, 1914. (Docket No. 44.) Reversed July 25, 1914.

Bowen, Douglas, Eaman & Barbour, for appellant.
Noble T. Lawson, for appellee.

STONE, J. The questions involved in this case are raised on certiorari to the industrial accident board. On December 18, 1912, Augustus Adams, a resident of Sandwich, Ontario, began work at the plant of the

Acme White Lead & Color Works in the city of Detroit. His duties were those of a sifter or bolter tender in the red lead plant. His work brought him in contact with the lead. On May 29, 1913, he left his work at the quitting time, but that evening became so ill that he was unable to return to work again. He died on June 27, 1913. There is no doubt that the cause of his death was lead poisoning, contracted industrially; i. e., "was an occupational disease," as the return of the industrial accident board shows. The return states:

"That during said period between December 18, 1912, and June 27, 1913, one Augustus Adams was in the employ of the Acme White Lead & Color Works; * * * and that during said period, while in the course of said employment, he contracted an occupational disease, to wit, red lead poisoning, upon the premises of the said company, and that on June 27, 1913, he died as a result of said disease."

The claim of the widow, under Act No. 10 of the Public Acts of the Special Session of 1912, was duly presented to a committee of arbitration and allowed. Thereafter, in accordance with the provisions of said act, the respondent filed with the said board a claim for review of the decision of said committee on arbitration, and later, after a full hearing, the said board made and entered an opinion and order, denying the contention of the respondent, and affirming the award of said arbitration committee. The opinion of the said board, upon which its order was based, so fully presents the questions involved that we cannot do better than to quote therefrom. After referring to the facts above set forth, it is said:

"These facts are undisputed, and the sole question in the case is whether the workmen's compensation act covers the case of death by lead poisoning arising out of and in the course of the employment. It is contended on behalf of respondent as follows: (1) That lead poisoning is not an accident; (2) that Act No. 10,

Public Acts of 1912, was not intended to provide compensation for diseases, but only accidents; (3) if the act does apply to industrial diseases, it is so far unconstitutional.

"It seems to be established under the English cases that lead poisoning is not an accident. It is an occupational disease. It seems to follow from this that, unless the Michigan workmen's compensation law, is broad enough to include and cover occupational diseases, the applicant's claim in this case must be denied. The controlling provision of the act on this point is found in section 1 of part 2, and is as follows: 'If an employee * * * receives a personal injury arising out of and in the course of his employment,' he shall be paid compensation, etc. It will be noted that the above language does not limit the right of compensation to such persons as receive personal injuries by accident. The language in this respect is broader than the English act, and clearly includes all personal injuries arising out of and in the course of the employment, whether the same are caused 'by accident' or otherwise. It is equally plain that lead poisoning in this case, in fact, constitutes a personal injury, and that such personal injury was of serious and deadly character. The board is therefore of the opinion that the section of the Michigan act is broad enough to cover cases of lead poisoning, especially the one in question."

The board also reached the conclusion that it would not be justified in holding the part of the act referred to invalid, on constitutional grounds.

By the assignments of error, it is claimed that the board erred: *First*, in construing the said act so as to provide for the awarding of compensation for an occupational disease, specifically red lead poisoning; *second*, in overruling appellant's contention that, if in said act the legislature intended to provide compensation for an occupational disease, particularly red lead poisoning, said act, in so far as it does so provide, is unconstitutional.

1. Does the Michigan act include and cover occupational diseases? This is a fair question, and should

be fairly answered. What is an "occupation," or "occupational disease?" The Century Dictionary and Cyclopedia defines an "occupation disease" as "a disease arising from causes incident to the patient's occupation, as lead poisoning among painters." In the instant case the undisputed medical evidence shows that lead poisoning does not arise suddenly, but comes only after long exposure. "It is a matter of weeks or months or years." It is brought about by inhalation, or by the lead coming into the system with food through the alimentary canal, or by absorption through the skin. In any case it is not the result of one contact or a single event.

"In occupational diseases it is drop by drop, it is little by little, day after day for weeks and months, and finally enough is accumulated to produce symptoms."

It also appears that lead poisoning is always prevalent in the industries in which lead is used, and a certain percentage of the workmen exposed to it become afflicted with the disease. Elaborate precautions are taken against it in the way of instructions to the men, masks to protect the respiratory organs, etc. Whether the workman will contract it or not will depend upon the physical condition, care, and peculiarity of the individual; and the amount of time it will take to produce ill effects or death also varies.

An "accident" is defined in Black's Law Dictionary as follows:

"Accident. An unforeseen event, occurring without the will or design of the person whose mere act causes it; an unexpected, unusual, or undesigned occurrence; the effect of an unknown cause, or, the cause being known, an unprecedented consequence of it; a casualty."

It might be well to keep in mind the conditions sought to be remedied by the diverse workmen's com-

pensation enactments which have been adopted by several of the States of the Union and in foreign countries. The paramount object has been for the enactment of what has been claimed to be more just and humane laws to take the place of the common-law remedy for the compensation of workmen for accidental injuries received in the course of their employment, by the taking away and removal of certain defenses in that class of cases.

In this our own act is not an exception. It first provides that in any action to recover damages for personal injury sustained by an employee in the course of his employment, or for death resulting from personal injuries so sustained, it shall not be a defense: (a) That the employee was negligent unless and except it shall appear that such negligence was wilful; (b) that the injury was caused by the negligence of a fellow employee; (c) that the employee had assumed the risks inherent in or incidental to or arising out of his employment, or arising from the failure of the employer to provide and maintain safe premises and suitable appliances.

It is then enacted that the above provisions shall not apply to actions to recover damages for the death of, or for personal injuries sustained by, employees of any employer who has elected, with the approval of the industrial accident board thereafter created, to pay compensation in the manner and to the extent thereafter provided. Manifestly, the terms "personal injury" and "personal injuries," above mentioned, refer to common-law conditions and liabilities, and do not refer to and include occupational diseases, because an employee had no right of action for injury or death due to occupational diseases at common law, but, generally speaking, only accidents, or, rather, accidental injuries, gave a right of action. We are not able to find a single case where an employee has

recovered compensation for an occupational disease at common law. Certainly it can be said that in this State no employer has ever been held liable to the employee for injury from an occupational disease, but only for injuries caused by negligence. It seems to us that the whole scheme of this act negatives any liability of the employer for injury resulting from an occupational disease. The title of the act is significant:

"An act to promote the welfare of the people of this State, relating to the liability of employers for injuries or death sustained by their employees, providing compensation for the accidental injury to, or death of employees, and methods for the payment of the same, establishing an industrial accident board, defining its powers, providing for a review of its awards, making an appropriation to carry out the provisions of this act, and restricting the right to compensation or damages in such cases to such as are provided by this act."

The first provision defining the employers who are subject to the act is found in section 5, subd. 2, of part 1. It reads:

"Every person, firm and private corporation, including any service corporation, who has any person in service under any contract of hire, express or implied, oral or written, and who, at or prior to the time of *the accident* to the employee for which compensation under this act may be claimed, shall in the manner provided in the next section have elected to become subject to the provisions of this act, and who shall not, prior to *such accident*, have effected a withdrawal of such election, in the manner provided in the next section."

While not controlling, it is pertinent to note the history of the Michigan act.

By Act No. 245, Public Acts of 1911, the legislature created a commission—

"To make the necessary investigation, and to prepare and submit a report * * * setting forth a

comprehensive plan and recommending legislative action providing compensation *for accidental injuries or death of workmen arising out of and in the course of employment.*"

Section 2 of the act reads:

"It shall be the duty of the commission of inquiry to fully investigate the conditions affecting, and the problems involved in the matter of compensation *for accidental injuries or death of workmen arising out of and in the course of employments.*"

The act drawn pursuant to this authority was passed by the legislature without change. While it cannot be claimed that the power of the legislature was limited to enacting the bill prepared by the commission, yet, when that body passed the bill without change, it may be said that it adopted the meaning that must have been intended by the commission.

It is the claim of appellant that lead poisoning contracted industrially is not an accident; that such poisoning, being something that is contracted by a fairly certain percentage of those working in industries where lead is used, cannot be considered as unexpected; that it comes as a gradual, slow process, and hence is not an "accident." The appellee, not agreeing with the reasoning of the board, contends that the act does cover injuries occasioned by lead poisoning, and that such poisoning contracted in the course of employment is an "accidental injury."

The English act of 1897 was entitled:

"An act to amend the law with respect to compensation to workmen for accidental injuries suffered in the course of their employment."

The body of the act provided that:

"If in any employment, to which this act applies, personal injury by accident arising out of and in the course of employment, is caused to a workman his employer shall be liable."

It was not long before it was necessary to determine what was personal injury by accident, and to give a definition of "accident." In *Hensey v. White* (1900), 1 Q. B. 481, the language of an earlier case was approved where it was said:

"I think the idea of something fortuitous and unexpected is involved in both words 'peril' or 'accident.'"

In *Fenton v. Thorley & Co.*, 72 L. J. K. B. 790, it was said:

"The expression 'accident' is used in the popular and ordinary sense of the word as denoting an unlooked for mishap or an untoward event which is not expected or designed."

Finally, in *Steel v. Cammell, Laird & Co., Ltd.* (1905), 2 K. B. 232, the precise point was decided. The applicant, a caulker in the employment of shipbuilders, was seized with paralysis, caused by lead poisoning, and became totally incapacitated for work. In the course of his work, in which he had been employed by the shipbuilders for a period of two years before he became incapacitated, he had to smear either with red or white lead certain places between the plates of ships into which water-tight shoes were put. The poisoning was such as might be expected from the nature of the work. It might be caused either by inhalation, or by eating food without having removed the lead from the hands, or by absorption through the skin. Only a small proportion of cases of poisoning of this description occurred amongst a number of persons working with red or white lead. The poisoning could not be traced to any particular day, and its development was a gradual process, and generally took considerable time. Held, that the lead poisoning could not be described as an "accident," in the popular and ordinary use of that word, so as to entitle the applicant to compensation for personal injury by accident arising out of, and in the course of, his employ-

ment, within the meaning of section 1 of the workmen's compensation act of 1897. *Fenton v. Thorley & Co.*, 72 L. J. K. B. 787, and *Brintons, Lim. v. Turvey*, 74 L. J. K. B. 474, considered.

The court in the above case [*Steel v. Cammell, Laird & Co., Ltd.*] reasoned that, under the act, a date must be fixed as that on which the injury by accident occurred, and it was said:

"It has been suggested that there was a series of accidents by the continuous absorption of lead, by one or other of the three processes named; but this suggestion does not meet the difficulty which arises from the provisions of the act as to notice of the particular date of the accident or injury."

Others of the judges said that the injury was not unexpected; that it was certain that somebody would suffer, and this man turned out to be susceptible to the poison. As a result of this case, it was found necessary to change the act, if cases like this were to be included; so in 1906, less than a year later, the act of 6 Edw. VII., chap. 58, was passed, entitled:

"An act to consolidate and amend the law with respect to compensation to workmen for injuries suffered in the course of their employment."

The body of the act again provides compensation for "personal injury by accident," but it also (section 8) provides that:

"Where the disease is due to the nature of any employment * * * he or his dependents shall be entitled to compensation under this act as if the disease * * * were a personal injury by accident arising out of and in the course of that employment"—if it be one of the diseases contained in schedule 3 of the act.

In that schedule "lead poisoning" and its sequelæ are therein scheduled. Of this act the *Encyclopædia of Laws of England*, vol. 5, p. 227, states:

"The extension by this act of the principle of workmen's compensation to industrial disease is a new departure. Disease, though contracted industrially, is not an 'accident' in the ordinary acceptance of the term."

It was also said of the act that a new phase in workmen's compensation—compensation for disease arising out of employment—was a new feature in this type of legislation. The language of the act should be particularly noted. It does not attempt to declare an industrial disease an "accident," but gives compensation therefor "as if the disease * * * were a personal injury by accident."

Considering the condition to be remedied and the history of the Michigan act, and comparing it with the English act of 1897, we are not able to agree with the accident board when it says, referring to the language which it quotes, that our act is broader than the English act, and clearly includes all personal injuries arising out of and in the course of an employment, whether the same are caused by "accident" or otherwise. In the language quoted by the board it is true that the words "personal injury" are used, but in determining the nature of the personal injury intended to be covered by the act, the whole act, with its title, should be examined and considered; and, so examined, we think it should be held that the words "personal injury," as quoted by the board, refer to the kind of injury included in the title and other portions of the act, which plainly refer to "accidental injury to, and death of, employees." The whole scope and purpose of the statute, in our judgment, was to provide compensation for "accidental injuries," as distinguished from "occupational diseases." We must hold, therefore, that the provisions of the act of this State are very similar to the early English act above referred to.

We have shown how the English act was subsequently amended by adding the provision permitting

the recovery of compensation for certain scheduled diseases, caused by, or especially incident to, particular employments—diseases known as occupation or industrial diseases. Not before, but since, the passage of this amendment to the English act, the English courts have sustained the rights of recovery in such cases as are here presented. The framers of our act either did not know of the amendment to the English act, or else they did not intend to permit the recovery of compensation in such cases. If it is said that it is just as important to protect employees against such conditions as are here presented as it is to protect them against injuries arising from what are strictly termed "accidents," our answer is that that is a matter which should be addressed to the legislature. In the absence of a provision in the statute meeting this situation, the court is unable to award a recovery.

Counsel for appellee have referred to some of the English cases where compensation was allowed for injuries caused by poisoning, but an examination of those cases will show that the injuries were purely accidental. *Higgins v. Campbell & Harrison, Ltd.* (1904), 1 K. B. 328, affirmed (1905) A. C. 230, is a fair illustration of those cases. There a workman employed in a woolcombing factory in which there was wool which had been taken from sheep infected with anthrax contracted that disease by contact with the anthrax bacillus which was present in the wool. In that case compensation was allowed, and it was held that the workman was injured by accident arising out of and in the course of his employment within the meaning of the English act of 1897. The court treated the disease as caused by an accident, by one particular germ striking the eyeball. It was considered that the accidental alighting of the bacillus from the infected wool on the eyeball caused the injury. It was treated as if a spark from an anvil hit the eye. This may be seen from the statement of Lord Macnaghten:

"It was an accident that the thing struck the man on a delicate and tender spot in the corner of his eye."

We think that this and kindred cases can be readily distinguished from the lead poisoning cases.

The same difficulty about giving notice of the accident or injury noted in the English act applies to the Michigan act. Every employer is required to keep a record of all injuries, fatal or otherwise, received by employees in the course of their employment. Section 17 of part 3 of our statute provides that:

"Within ten days after the occurrence of an accident resulting in personal injury a report thereof shall be made in writing to the industrial accident board on blanks to be procured from the board for that purpose."

And a penalty is prescribed for neglect to make such report.

In the instant case Adams left his place of employment at the usual quitting time on May 29, 1913. He did not return. What knowledge his employer had of his sickness does not appear. It is not apparent what notice could be given under our statute in such a case. If our statute, in its present form, should be held to apply to occupational or industrial diseases, then compensation might be claimed of an employer where the term of employment had been for a brief period, whereas the disease may have been contracted while in the employment of a former employer. All this is provided for in the amendment of 1906 in the English act, where provision is made for investigation and apportionment among employers for whom the employee worked during the previous year "in the employment to the nature of which the disease was due." There is no such machinery or procedure provided for in our statute.

We are not unmindful of the holdings of the supreme court of Massachusetts in *Re Hurle*, 217 Mass.

223 (104 N. E. 336), and *Johnson v. Accident Co.*, 104 N. E. 735. In the latter case that court held that the personal injury of a lead grinder, sickness incapacitating him from work resulting from the accumulated effect of gradual absorption of lead into his system, arose "out of and in the course of his employment" within the workmen's compensation act (Stat. 1911, chap. 751) of that State. That case is founded upon *In re Hurle, supra*, which was a case of blindness incurred from an acute attack of optic neuritis, induced by the poisonous coal tar gases escaping from a furnace about which he was required to work. The matter of accidental injury was not discussed by the court. The court said:

"The question to be decided is whether this was a 'personal injury arising out of and in the course of his employment' within the meaning of those words in the statute."

The court further, in referring to the comments of counsel for the employer that the act could not apply to such an injury as that sustained, said:

"It might be decisive if 'accident' had been the statutory word. It is true that in interpreting a statute words should be construed in their ordinary sense. 'Injury,' however, is usually employed as an inclusive word. The fact remains that the word 'injury,' and not 'accident,' was employed by the legislature throughout this act."

As "accident" is the controlling word in our act, we do not think that the Massachusetts decision should be held to apply here, as the construction of that act has little, if any, bearing on the Michigan act.

Our attention has been called to the Massachusetts act, which differs in many respects from our act. That act is entitled:

"An act relative to payments to employees for personal injuries received in the course of their employment, and to the prevention of such injuries."

The whole scope of the act seems to be to provide for compensation for personal injuries received in the course of employment. In many instances where the word "accident" occurs in our statute the word "injury" is used in the Massachusetts statute. It is true that the Massachusetts board is termed an "Industrial Accident Board," but, aside from the use of the word "accident" in that title, we are unable to find the word in the body of the act, except in two instances in section 18 of part 3, which provides for the keeping of a record and making a report by the employer in case of accident. This may be said not to be very controlling; but, in our judgment, it has to do with the inquiry as to the scope of the act. We are unable to follow those cases as authority under our statute.

In New Jersey, in the case of *Hichens v. Metal Co.*, N. J. Law Journal (Com. Pl. June 25, 1912), p. 327, which arose under the New Jersey act (P. L. 1911, p. 134) entitled very similarly to the Massachusetts act, to wit—

"An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder"

—it was held that compensation could not be awarded for a disease known as copper poisoning, caused by contact with the copper filings and inhaling the dust from same by an employee in his work, which involved the grinding and polishing of brass products. This decision cannot be considered as authoritative, as it is that of the court of common pleas, and not the court of last resort.

The Federal compensation act (Act May 30, 1908, chap. 236, 35 Stat. 556 [U. S. Comp. Stat. Supp. 1911, p. 468]), relating to government employees does not

contain the word "accident" in the principal clause, but provides that compensation shall be granted "if the employee is injured in the course of such employment." Subsidiary clauses provide for the reporting of "accidents," and otherwise refer to "accidental injuries."

In the latest opinion of the attorney general, being in the case of John Sheeran, where the employee was a laborer engaged in river and harbor construction, and, while engaged in work in the course of his employment, contracted a severe cold, which resulted in pneumonia, that officer said:

"There is nothing either in the language of the act or its legislative history which justifies the view that the statute was intended to cover disease contracted in the course of employment, although directly attributable to the conditions thereof. On the contrary, it appears that the statute was intended to apply to injuries of an accidental nature resulting from employment in hazardous occupations—not to the effects of disease."

It has been reiterated under the Federal act that acute lead poisoning is not such an injury as entitles an employee to compensation. Similarly, where a workman suffered from cystitis and prostatitis, which he claimed was the result of overwork, it was held that he was merely suffering from disease which was not covered by the terms of the Federal act, and compensation was refused. 1 Bradbury on Workmen's Compensation (2d Ed.), pp. 342, 343.

We are of opinion that in the Michigan act it was not the intention of the legislature to provide compensation for industrial or occupational diseases, but for injuries arising from accidents alone.

2. If it were to be held that the act was intended to apply to such diseases, it would, in so far as it does so, be unconstitutional and in violation of section 21

of article 5 of the Constitution of this State, which provides that:

"No law shall embrace more than one object, which shall be expressed in its title."

That the act, if it were held to apply to and cover occupational diseases is unconstitutional in so far as it does so is shown by the fact that the body of the act would then have greater breadth than is indicated in the title. A careful analysis of the title of the act shows that the controlling words are "providing compensation for accidental injury to or death of employees." No compensation is contemplated except for such injuries. The prefatory words are generally dependent upon the above-quoted clause. The only compensation provided is for "accidental injury to or death of employees," and the last clause of the title restricts the right to compensation or damages in such cases "to such as are provided by this act."

The Massachusetts decisions have no bearing upon this branch of the case for two reasons: One is that the titles of the respective acts differ materially; and the other reason is that Massachusetts has no such constitutional provision as ours above quoted. We have dealt with this question of title too recently to make it necessary to refer to our numerous decisions upon the subject.

For the reasons above given, we are constrained to reverse the order and judgment of the industrial accident board.

Reversed.

MCALVAY, C. J., and BROOKE, KUHN, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

HASS v. BOOTH.

1. NEGLIGENCE — SIGNS—STREETS—FALLING SIGN—SIDEWALKS—INJURY TO PEDESTRIAN.

In an action for personal injuries resulting from a sign falling upon the sidewalk in a city street, and striking plaintiff, it was error to direct a verdict for the defendant, owner of the sign, on the ground that he employed an independent contractor, who was reputable and competent, to suspend the sign.

2. SAME.

Pedestrians upon the street have the right to absolute safety while exercising ordinary care and prudence: sign boards or other projections or encroachments so situated that if they fall they may do injury to travelers are nuisances unless so secured as to be perfectly safe; the person maintaining them is liable for all injuries arising from the falling of such obstruction except in cases of inevitable accident.¹

3. SAME—NUISANCE—HIGHWAYS AND STREETS.

It has frequently been held that any encroachment upon a street, either on or above the surface, of a permanent nature, which endangers or interferes with its use, is a public nuisance.

4. SAME—PERSONAL INJURIES.

Where plaintiff's attorney did not contend that the owner of the sign must maintain it at his peril in an absolutely safe condition, but took the ground that he was chargeable with a very high degree of care, the court should have submitted the question to the jury on that theory of negligence.

5. SAME—MUNICIPAL CORPORATIONS.

The duty of the defendant was not lessened by the alleged fact that he had secured the right to maintain the structure in or above the street for advertising purposes from the city council, or by the possibility that the municipality

¹ As to the liability of an abutting owner for injury from falling of object suspended over street, see notes in 12 L. R. A. (N. S.) 721 and 24 L. R. A. (N. S.) 139.

through failure to cause the removal of the nuisance might be held liable.

6. SAME—EVIDENCE — CERTIFICATE OF PUBLIC INSPECTOR—RES IPSA LOQUITUR.

The certificate of the inspector from the department of building that the sign had been inspected, unsupported by proof that the inspection was adequately or carefully made, or that the defect in the sign was latent, did not establish a defense to the action; plaintiff's evidence tending to show that seven months had elapsed and no one had inspected the sign, presented an issue of fact for the jury.

Error to Wayne; Murphy, J. Submitted April 22, 1914. (Docket No. 112.) Decided July 25, 1914.

Case by Bessie Hass against Frank E. Booth for personal injuries. Judgment for defendant. Plaintiff brings error. Reversed.

Florian, Moore & Wilson, for appellant.

Charles E. Duffy (*William G. Fitzpatrick*, of counsel), for appellee.

BROOKE, J. At about 2 o'clock in the afternoon on the 13th day of July, 1912, plaintiff was passing along Gratiot avenue near its intersection with Woodward avenue in the city of Detroit. When she had almost reached the corner, a sign 8 feet long, 4 feet wide and 8 inches thick, maintained by the defendant for advertising purposes, and suspended between 20 and 25 feet above the sidewalk, fell. In falling it struck plaintiff, causing the injury of which complaint is made. The sign had been erected two years and two months prior to the accident by Walker & Co., competent and reputable sign builders of the city of Detroit. On December 13, 1911, exactly seven months prior to the happening of the accident, the sign was inspected by an inspector from the department of buildings of the city of Detroit, who issued to the defendant the following certificate:

"This certifies that the sign projecting from the building at the northeast corner of Woodward and Gratiot avenues has been inspected and found to be in safe condition. [Signed]

"DEPARTMENT OF PUBLIC BUILDINGS."

The defendant, being examined under the statute by plaintiff's counsel, testified as follows:

"Q. And from the time that Walker & Co. installed that sign until the time of the accident you yourself gave no inspection?

"A. I would look at the sign occasionally.

"Q. Did you test it in any way?

"A. No, sir.

"Q. The only inspection that that sign got was from the department of buildings?

"A. That is all I know of, yes."

The record discloses that at the time of the occurrence of the accident there was no unusual atmospheric disturbance.

The declaration charged the defendant with negligence in the construction of the sign in question, negligence in the maintenance of the sign, and negligence in failure to properly inspect. The court directed a verdict for the defendant, holding that, he having engaged a competent and reputable contractor for the purpose of erecting the sign, he was therefore absolved from liability based upon a negligent erection. The court further held upon this point that plaintiff's action, if any, would be against Walker & Co. as an independent contractor. This instruction was erroneous. See *Lauer v. Palms*, 129 Mich. 671 (89 N. W. 694, 58 L. R. A. 67), and authorities there cited. Also *McHarge v. Newcomer*, 117 Tenn. 595 (100 S. W. 700, 9 L. R. A. [N. S.] 298). The court below then held that there was no evidence sustaining the charge of negligent maintenance of the sign, and that the inspection by the appropriate city department was adequate. It was and is the contention of the defendant,

which view was accepted by the court below, that the record was entirely barren of evidence indicating any negligence on the part of the defendant which contributed to plaintiff's injury, and that to permit a recovery would be to allow the jury to indulge in conjecture as to the cause of the accident, and ultimately to base their verdict upon the single fact that the sign had fallen and the plaintiff was injured. We are not able to agree with this view of the case. It may be stated at the outset that the authorities as to the liability of one for injury, occasioned to a pedestrian lawfully upon the street, by the falling of a sign or awning maintained by the owner or occupier of a building, and suspended over the sidewalk, are not harmonious. In most jurisdictions it is held that the doctrine of *res ipsa loquitur* applies, but that the defendant may avoid recovery by affirmative proof showing that he had exercised ordinary care. The question is fully discussed in *Waller v. Ross*, 100 Minn. 7 (110 N. W. 252, 12 L. R. A. [N. S.] 721, and note, 117 Am. St. Rep. 661, 10 Am. & Eng. Ann. Cas. 715). A later case upon the subject is *McCrorey v. Garrett*, 109 Va. 645 (64 S. E. 645, 24 L. R. A. [N. S.] 139). In the latter case the defendant was held liable for injury occasioned by a falling awning maintained without legislative authority, regardless of the question of his negligence, either as to its construction or maintenance. In that case it is said:

"So far as the right of the public to travel unmolested over the highway is concerned, the dominion of the people is absolute, and is not confined to obstructions on the surface of the street, but extends with equal emphasis to encroachments upon the public right either below or above the surface. Indeed, an obstruction above the street that may injure the traveler is more dangerous than one on the ground, because the latter is more readily seen and avoided"—citing 1 Wood on Nuisances (3d Ed.), § 275, pp. 141, 142;

Elliott on Roads and Streets, vol. 2 (3d Ed.), §§ 790, 830; 2 Dillon on Municipal Corporations (4th Ed.), § 1033.

In 1 Wood on Nuisances, *supra*, it is said:

"Every person in traveling upon a public street has a right to absolute safety, while in the exercise of ordinary care, against all accidents arising from obstructions of or imperfections in the street, and this applies as well to what is in the street as to what is over it. * * * It would seem that all signboards, cornices, blinds, awnings, and other things projecting over a walk, or so situated with reference thereto that if they fall they may do injury to travelers, are nuisances unless so secured as to be absolutely safe, and the person maintaining them is liable for all injuries arising therefrom, except such as are attributable to inevitable accident."

This court has never had occasion to determine exactly what degree of care would absolve from liability one who maintains a sign or awning over a public street for his own purpose in case said sign or awning fell upon a foot passenger lawfully occupying the sidewalk thereunder. It has frequently been held that any encroachment upon a street, either on or above the surface, of a permanent nature, which endangers or interferes with its use, is a public nuisance. 2 Dillon on Municipal Corporations (4th Ed.), §§ 586, 587, 730, 1032; *Wood v. Mears*, 12 Ind. 515 (74 Am. Dec. 222); *Van O'Linda v. Lothrop*, 21 Pick. (Mass.) 292 (32 Am. Dec. 261); *Raymond v. Keseberg*, 84 Wis. 302 (54 N. W. 612, 19 L. R. A. 643); *Sikes v. Town of Manchester*, 59 Iowa, 65 (12 N. W. 755); *Welsh v. Wilson*, 101 N. Y. 254 (4 N. E. 633, 54 Am. Rep. 698). The English courts come very near to holding that the duty to maintain such a structure in safety is an absolute one. *Tarry v. Ashton*, L. R. 1 Q. B. Div. 314. See, also, *Roberts v. Mitchell*, 21 Ont. App. Rep. 433.

In this case plaintiff does not contend that defendant must maintain such a structure at his peril. He urges, however, that one who maintains, suspended over the sidewalk of a crowded city for his own purpose, a sign or other structure, which if permitted to fall is liable to kill or injure those lawfully using the sidewalk beneath it, should be charged with a very high degree of care. It is unnecessary, therefore, in the instant case to say more than that the plaintiff's contention as to defendant's duty is warranted by the law. This duty is not lessened by reason of the fact that the offending party may have secured the right to maintain said sign from the legislative authority of the municipality, nor by the further fact that the municipality itself, through a failure to cause the removal of such sign or structure as a nuisance, might itself be liable under the authorities last cited. The facts in the case at bar disclose more than the simple falling of the sign. They show that the defendant for seven months prior to the day of the accident had caused no inspection to be made of the structure. The certificate of the inspector from the department of buildings proves nothing. It does not show whether the inspection was adequate or inadequate. Nor does it have a tendency even to prove that the sign fell because of a latent instead of a patent defect. The language of Mr. Justice OSTRANDER in the case of *Scott v. Athletic Association*, 152 Mich. 684 (116 N. W. 624, 17 L. R. A. [N. S.] 234, 125 Am. St. Rep. 423, 15 Am. & Eng. Ann. Cas. 418), is applicable:

"The testimony goes much beyond proving merely an accident and resulting injury. That relied upon to show that defendants exercised due care tends to prove that the stand was erected by a competent and experienced builder, of good materials; that before it was used it was inspected by engineers and others admittedly competent to perform the work of inspection, who pronounced it safe. It is clear, however, that a

wholly inadequate structure was in fact tendered for public use, and it cannot be determined, upon this record, as a matter of law, that a latent and not a patent defect, discoverable in the exercise of proper care, existed."

See, also, *Barnowsky v. Helson*, 89 Mich. 523 (50 N. W. 989, 15 L. R. A. 33); *Lauer v. Palms*, *supra*.

The question of defendant's negligence, under proper instructions as to his duty in the premises, should have been submitted to the jury.

The judgment is reversed, and a new trial ordered.

MCALVAY, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

PEOPLE v. BARNES.

1. CRIMINAL LAW — EVIDENCE — SPEED — AUTOMOBILES — EXPERT OR OPINION EVIDENCE — JUDGMENT AS TO SPEED.

Upon the trial of a respondent charged with negligently killing a young girl by colliding with her in operating an automobile on a public highway at an excessive rate of speed, the trial court erred in admitting the testimony of an eyewitness that the average speed before reaching a point 50 or 60 feet behind the decedent from a place about a mile distant was 30 miles an hour; the court taking judicial notice of the fact that a competent chauffeur, as the respondent was shown to be, would be able to change the speed at different points.¹

2. SAME — HOMICIDE — CRIMINAL NEGLIGENCE — MANSLAUGHTER — MOTOR VEHICLE LAW — EVIDENCE.

It was also incompetent to introduce testimony showing the rate of speed of an automobile that was like the car which

¹ On the question of evidence as to speed of automobile, see note in 34 L. R. A. (N. S.) 778.

respondent was driving, more than a mile and a half away from the place of accident, the identification by such witness being incomplete; as the point at which the observation was made was too remote from the place of accident.

3. SAME—TRIAL—CHARGE.

The trial court in its charge to the jury should not have eliminated the questions of proximate cause and the negligence of decedent by instructing the jury that if at the time the accused ran upon the deceased he was operating his car in excess of ten miles an hour he was guilty of manslaughter: respondent was, also, entitled to have the jury consider the question whether he was aware that he was doing the alleged unlawful act, as bearing upon the charge of gross negligence.

4. SAME—MOTOR VEHICLE LAW.

Although a wilful violation of the statute might constitute negligence, it does not follow that such negligence would, under the circumstances of each case, amount to manslaughter.

5. SAME—PROXIMATE CAUSE—CONTRIBUTORY NEGLIGENCE.

The questions for the jury to determine were whether the act of the respondent in driving at an excessive rate of speed was the proximate cause of the death of decedent: and whether respondent was responsible under the law whether her failure to use due care contributed or not to her injury.

6. SAME—EXCESSIVE SPEED.

It must be made to appear in such a proceeding that the homicide was the natural and necessary result of the unlawful act; that death ensued because of, and as a direct and natural result of, the recklessness or gross negligence of the respondent.

7. SAME—NEGLECT—MANSLAUGHTER.

Not every degree of carelessness or negligence renders a party guilty of manslaughter; the case may be one of mere misadventure; to warrant a conviction, there must have been gross negligence, which is criminal and, within certain limits, supplies the place of affirmative criminal intent.¹

Exceptions before sentence from Ingham; Wiest,

¹ As to homicide by negligent operation of automobile, see notes in 30 L. R. A. (N. S.) 458 and 33 L. R. A. (N. S.) 403.

J. Submitted April 23, 1914. (Docket No. 165.) Decided July 25, 1914.

William G. Barnes was convicted of manslaughter. Reversed.

Grant Fellows, Attorney General, and *Charles H. Hayden*, Prosecuting Attorney (*L. B. McArthur*, of counsel), for the people.

L. B. Gardner and *Frank L. Dodge*, for respondent.

STONE, J. The respondent was charged with, and was convicted of, the crime of manslaughter. It is alleged and claimed by the people that about 2 o'clock p. m., on May 27, 1911, while driving an automobile in the township of Lansing, on Michigan avenue east, the same being a public highway and thoroughfare, and while going east toward the Agricultural college, and when in front of what is known as the Baker house, the respondent carelessly, recklessly, negligently, wantonly, wilfully, and feloniously operated said automobile at an excessive, reckless, and dangerous rate of speed, to wit, 20 miles an hour; that he then and there carelessly, recklessly, wantonly, wilfully, and feloniously neglected and failed to keep a necessary and proper lookout for pedestrians upon said public highway, and did then and there carelessly, recklessly, wantonly, wilfully, and feloniously neglect to sound his horn, or to give other necessary and proper warning of the approach of said automobile, and did then and there in the manner aforesaid neglect and fail to keep and have said automobile within his proper management and control, and, as a result of operating said automobile in the manner aforesaid, respondent did then and there operate and drive said automobile against, upon, and over one Mary Robb, a young woman of the age of 16 years and upwards, and did inflict upon the body of said Mary Robb such

injuries as produced her immediate death, concluding in the technical language of the statute that the respondent thereby wilfully and unlawfully did kill and slay the said Mary Robb.

The evidence on the part of the people upon the trial tended to show that the respondent and another young man, a friend of his, started to go upon said avenue to the Agricultural college, the respondent operating an Oakland 30 horse power roadster automobile, painted red; that while on their way they stopped near the Union depot, in the city of Lansing, and purchased two cigars, and then continued their journey east. The rate of speed at which the respondent drove is in dispute. On the part of the people there was evidence tending to show that from a mile and a half west of where the accident occurred to within a few rods of the place of the accident the automobile was being driven by the respondent at a rate of speed of from 30 to 40 miles an hour; that after it struck or ran over the girl he was running from 17 to 20 miles an hour. It is undisputed that, as they went down the small hill near the race track east of the city limits, they saw Mary Robb and a younger companion going east in the wrought portion of the highway; the highway being about 30 feet wide. There was evidence tending to show that the respondent sounded the horn while going down the hill and again when within 50 or 60 feet of the girls. The respondent himself testified that, until they approached within 50 or 60 feet of the girls, they did not at any time in their speed exceed 15 to 18 miles an hour. The respondent upon his direct examination testified as follows:

"From the time that we left the cigar store until we came to the hill near the race track, we drove the car from 15 not to exceed 18 miles an hour. The highway on Michigan avenue east is 27 to 30 feet wide. I saw the two girls ahead of us. I do not

remember of my attention being called to them; I remember that I saw them just after going over the race track hill. Do not remember sounding my horn back at the race track; the girls were a little south of the wrought portion of the road. They had parasols with them. I was then coming down about the center of the road on the macadam part of the road. In the highway from the city limits out to the Baker home, there was most of the way ruts, varying in depth, where automobiles had run along.

"Q. Did you, before the girl was struck, sound your horn?

"A. Yes, sir.

"Q. Within about how many feet, in your best judgment, was it that you sounded the horn?

"A. Fifty or sixty feet; it might have been further than that. At about the time I sounded the horn I started to turn to the north from center of the highway. The girls were a little to the south of the center of the highway. I sounded my horn when I started to bear out to the north; I was going probably 15 miles an hour, not to exceed 18. I reduced the speed after that; I did not exceed the speed of 15 or 18 miles an hour from the time I saw the girls up toward the hill to the point where I began to turn out to the north. The girls went a little to the north; took a couple of steps to the north; I got within a few feet of them, and the Robb girl got in front of the machine. At that I turned as far to the north as I could; I did not have time to stop. I thought I could miss her by turning the car; I turned as far to the north as I could, and the fender struck her and brushed her down. The Robb girl that was injured was on the south side of the two girls, or on the right-hand side in the direction that they were going; the Taylor girl was on the left or north side. The girls were walking along to the east about as close as they could walk comfortably, side by side. The girls started to the north shortly after I blew the horn; they both turned around. When they started to the north, I would estimate the distance to be 25 or 30 feet that the machine was west of the girls. I did reduce the speed from the point that I was beginning to bear out from the north.

"Q. Was there any doubt in your mind at that time that you would be able to pass the girls safely?

"A. Not a bit. I had plenty of room to pass them; I expected to pass them all right.

"Q. Now what rate of speed did you reduce that machine before you struck the Robb girl?

"A. I reduced it to 8 or 10 miles an hour, not to exceed 10 miles an hour.

"Q. Not to exceed 10 miles an hour?

"A. No, sir; when the Robb girl darted to the north, the Taylor girl went to the south. I did not have time enough to reach over and catch the lever and draw it back and put on the emergency brake. I think the car would have reached the girl, had I attempted that, before I could have applied that brake. I stated that I started to bear out to the north as I approached these girls about 50 or 60 feet west of them. I reduced the speed of my automobile from where the girls were, a distance back of about 30 or 40 feet, to 8 or 10 miles an hour; after I blew the horn I turned the car to the left, to the north of the road, threw out the clutch, put the brake on, slackened the speed of the car down to 8 or 10 miles an hour, and expected to pass the girls all right. I had plenty of room. I got within a few feet of them; the Taylor girl went to the south, and the Robb girl started to the north. I did not have time then to stop the car, so I turned as far as I could; that would be to the north. * * * There was not the slightest warning at all given on the part of the Robb girl before she darted out in front of our car. I expected to pass them all right; I had plenty of room."

On cross-examination the respondent testified as follows:

"I saw those girls after I broke over the hill, with their umbrellas up, going to the east. They were close to a half mile ahead of me, I guess. There was no obstruction, a clear view. My car at that time was in perfect condition; that is, I had power to control it. At the place of the accident the traveled portion of the road was about 30 feet. My automobile was 6 feet over all. * * *

"Q. You were directly back of the girls when you blew your horn?

"A. Yes, sir; I would say about 50 or 60 feet as near as I can remember it. I did not think that they would get out of the highway; no, sir. I thought they would stay where they were. I had plenty of room to pass them to the left. It was right and proper I should turn to the left to go by them. * * *

"Q. You say that you supposed that they knew you were going to pass them?

"A. I should say, I blew the horn to warn them I was going to pass them.

"Q. Isn't this true that when you blew your horn you didn't intend to pass?

"A. I certainly did intend to.

"Q. Didn't you blow your horn for them to get out of the highway?

"A. No, sir; I didn't. I blew my horn to attract their attention to let them know I was coming. I was directly back of them, and they were in front of me, when I blew the horn. They were a little to the south of the center of the highway. I might have got by them on the south side. There were three tracks there. When I blew the horn the girls looked around. I started to turn out about the same time I blew the horn. When I blew the horn the girls looked around; they took a couple of steps east, then started toward the north of the road a couple of steps, then they stopped. I supposed they were going to stand there, and then I had room to pass them. I got up within a few feet of them; the Taylor girl went to the south of the road, and the Robb girl got right out in front of the machine, and I did not have time to stop. The only thing I could do was to turn to the left. Going at the rate of 18 miles an hour, I could have stopped my machine on that day in 25 or 30 feet, I should say. From the time I sounded my horn I could have stopped, if it had been necessary. I did not attempt to stop. I had plenty of room to pass them. At the time I saw these girls ahead of me 50 or 60 feet away, I could have stopped my machine in 25 or 30 feet; the reason I didn't do it was that I had plenty of room to pass the girls. I expected to pass them all right, and I turned out for the purpose of passing the girls.

When the girls took the couple of steps to the east they did it quickly. I did not think they were excited. The Robb girl started and ran from the center of the beaten track to where I struck her. I don't think it was 12 feet from where she started to where I struck her. The Robb girl was a little to the right or south of the center of the highway when I blew my horn. She had not gotten out of the beaten track when I struck her."

William H. Peavey, the companion of the respondent at the time of the accident, was sworn as a witness for the people. He testified, in substance, that when they were going down the hill near the race track, they saw the two girls in the road ahead of them; that witness remarked to the respondent, who was driving the car, that there was somebody ahead of them; that, while respondent made no reply, he blew the horn pretty close to that time. The following occurred upon his direct examination:

"I remember of hearing the horn sounded again before the girl was struck; it was a point I should judge 50 feet from the girls, as near as my recollection, I would say so. The last time was one long, straight blast of the horn, as near as I can remember. When this last sound was given, the girls, I think, looked around, after we saw the girls from the hill. Mr. Barnes slackened the speed of the auto; he slackened the speed, it seems to me, just previous to or before he sounded his horn the last time. I have a judgment as to the speed of the auto at the time the horn was sounded the last time previous to his slackening the speed; I should say not over 20 or 25 miles an hour we were going.

"Q. Mr. Peavey, what would you say was the speed of that automobile? Give your best judgment, if you have any, on the subject as to the *average speed* of that auto from the time you left or after Mr. Barnes purchased the cigars up to the time he slackened the speed when within about 50 feet of the girls as you say.

"*Respondent's Counsel:* That is objected to as incompetent and immaterial, the *average speed*.

"Prosecuting Attorney: I submit that it is very material.

"Respondent's Counsel: We would like to assign the further reason that the distance back would be too remote; it being over a mile away from the scene of the accident.

"The Court: He may answer. (An exception.)

"A. I don't know; as near as I could tell 30 miles an hour."

Walter S. Foster was called as a witness for the people and testified:

"I live at 1110 Michigan avenue east, Lansing. Have a laundry out there. It is six or eight blocks west of the east end of the pavement [Bingham street intersection]. I remember the day of the accident. I was on my porch painting the floor in the afternoon. I saw a red automobile go by that afternoon. I did not know Mr. Barnes at that time. I do not remember of seeing more than one red automobile. It was 5 minutes after 2 by my watch when I finished painting. It was a red automobile, with a black top; there were two persons in it. Have lived on Michigan avenue for three years; have noticed the operation of automobiles and other moving objects, such as horses and vehicles and horse racing. Have rode in automobiles; had occasion to observe how fast they were going while riding in them by looking at the speedometer.

"Q. Tell the jury, in your own opinion, what speed the car was running when it went by.

"Respondent's Counsel: I object to that as incompetent, having no tendency to show the rate of speed at the time this automobile met with this accident. It has no tendency to show any issue in this case. It is at least a mile and a quarter—I think it would be conceded to be more than that—from the scene of the accident.

"Counsel for the People: We will not concede that.

"Respondent's Counsel: Suppose this was the car in question, and he undertook to show that necessarily it was placed within that point and the scene of the accident; it was going 5 or 10 miles an hour; it would

have no bearing on the speed of the car the speed the car might be going at the time of the accident.

"The Court: Standing alone, this testimony would not be admissible; but in connection with the other testimony given I think it is for the consideration of the jury, and I will take occasion later on to explain to the jury the limit to be given this testimony. (Exception by respondent's counsel.)

"A. Forty miles an hour."

As a witness for the respondent, the county surveyor testified to some actual measurements made by him which appear to be uncontradicted. Among other things he testified:

*"From the Baker driveway to Bingham street as it intersects Michigan avenue, it is about 20 rods more than a mile and a half, or a mile and 180 rods. * * **

** From the end of the pavement to the Baker house is 35 rods less than a mile. * * * Standing in the highway, you can see west from the Baker home a little over a half mile."*

In its charge the trial court called the attention of the jury to the following provisions of the statute relating to the operation of motor vehicles upon public highways:

*"No person shall operate a motor vehicle upon a public highway at a rate of speed greater than is reasonable and proper, having regard to the traffic and use of the highway, or so as to endanger the life or limb of any person or the safety of any property. * * * Upon approaching a person walking in the roadway of a public highway, * * * a person operating a motor vehicle shall slow down to a speed not exceeding ten miles an hour and give reasonable warning of its approach, and use every reasonable precaution to insure the safety of such person."*

In charging the jury, the trial court used the following language:

"Was the automobile driven by respondent up to the person of Mary Robb at a speed in excess of 10 miles an hour? If so, it was an unlawful act on re-

spondent's part, and, if in doing so he killed Mary Robb, the act was manslaughter. * * *

"When respondent approached the two girls in the highway, was he driving the automobile at an unlawful and prohibited speed; that is, did he drive at a speed exceeding 10 miles per hour up to the time the automobile struck Mary Robb? If so, then he may be found guilty of manslaughter, even though he made the best endeavor possible under such speed to avert the accident, and even though Mary Robb, in bewilderment, or heedlessness, or carelessness, ran in front of the automobile; for in such event he was doing an unlawful act in violating the speed regulation, and the law will not excuse him from the consequences for his unlawful behavior, on the ground that Mary Robb, in the excitement of the occasion, did not act with proper judgment."

Upon the conviction of the respondent of the crime of manslaughter, he has brought the case here for review upon exceptions before sentence.

There are numerous assignments of error, many of which we shall not speak of specifically, and it may be said that some of them are without merit.

The fifth assignment of error is to the effect that the court erred in permitting the witness Peavey to testify as to the average rate of speed of the automobile operated by the respondent from the time they purchased the cigars up to the time he slackened the speed when within about 50 feet of the girls in the highway.

By the eighteenth assignment of error it is claimed that the court erred in permitting the witness Foster to testify as to the speed of an automobile when it went by his place, at or near the intersection of Bingham street.

Error is also assigned upon that portion of the charge above quoted.

1. In our opinion it was prejudicial error to permit the witness Peavey to testify as to his judgment of the *average speed* of the automobile from the place

where the respondent purchased the cigars near the Union depot until he slackened the speed when within about 50 or 60 feet of the girls in the highway. It is common knowledge, and we will take notice of the fact, that a competent chauffeur, as it is uncontradicted the respondent was, would so be able to control and change the speed of an automobile at different points in the space covered that it would, in our judgment, be no aid to, or criterion for, the jury to know what the *average speed* of the automobile was upon this occasion.

2. We are of opinion that the testimony of the witness Foster as to the rate of speed of the automobile which he saw driven upon the day in question at a point six or eight blocks west of the east end of the pavement, over a mile and a half away, was too remote and vague to identify the automobile in question, and too immaterial to be submitted to a jury in the trial of a criminal case. In our opinion it was prejudicial error. It is true that the court in its charge called the attention of the jury to the use which might be made of such testimony. That language was as follows:

"Some witnesses to the speed of the car, at a distance from the place of the accident, did not undertake to identify respondent as the driver, and it now rests for you to determine from all the evidence whether the automobile such witnesses described, and upon the speed of which they have given their judgment, was the automobile driven by respondent on the journey upon which the accident happened. If it was the automobile driven by the respondent on the way to the place, and on the journey during which the accident happened, then such testimony may be considered within the purpose I shall point out. The speed of the automobile cannot be reproduced or described to you as it appeared to the witnesses except by an expression of its speed in miles per hour. The weight to be given such testimony rests with you, and you should have in mind the opportunity or lack of

opportunity, if any, a witness had for forming a fairly reliable judgment of such speed so witnessed. And you should remember that such estimates of speed are no more than opinions, and not even claimed to be absolutely correct, and cannot in the nature of things be exact; and it rests for you to judge what weight you will give the same. The speed of the automobile before it made its approach near enough to Mary Robb to call upon the driver to reduce its speed to that of not to exceed 10 miles an hour has no bearing upon the issues before you, except as it may or may not show a recklessness and wantonness in respondent on that trip and continued up to, and explanatory of, the accident."

Aside from the time when the witness Foster testified that he saw an automobile pass his house, there was nothing tending to show the identity, except that the car about which he testified was a red automobile, with a black top, and that there were two persons in the car. In a much traveled public street like the one in question, we think it unsafe to leave to a jury testimony of this nature. The rate of speed testified to by the witness Foster at this point was a high rate of speed of 40 miles an hour. Not only was it remote in point of distance from the place of the accident, but it was so vague and indefinite as to identity that it sent the jury into the field of speculation as to whether the car which Foster saw was the respondent's car or not. The minds of the jury may have never met upon this question. Some jurors may have believed it to have been respondent's car, and others not. In our opinion the receiving of such evidence was prejudicial error.

3. This brings us to the charge of the court, and presents the most important question which we have to consider in the case. The court seems to have submitted here to the jury the bald proposition that if, at the time the respondent struck the deceased, he was operating his car in excess of 10 miles an hour,

he was guilty of manslaughter, for there is no doubt that the respondent's car did strike or run over the deceased and cause her death. In our opinion this eliminated from the case all question of the proximate cause of the death of Mary Robb, and also eliminated the question as to her conduct or action on the occasion. As the court well instructed the jury, the rate of speed at which the car was being operated at any point was matter of opinion or judgment. We have here the positive testimony of the respondent that he was not running at the time to exceed 8 or 10 miles an hour. From aught that appears in this record, the injury might have occurred just the same if the respondent had been running 9 miles an hour as it would were he running 11 miles an hour. The charge eliminates from the case all question of whether the respondent, in good faith, believed he was running within the statutory limit, and makes a mistake of judgment on the part of respondent amount to a crime. While it is not the law that, in order to convict the respondent, it must be made to appear that he knowingly violated the statute, because he is bound to know the law, yet there is authority to the effect that he must have been aware, in order to be convicted, that he was doing the unlawful act complained of. We know of no case that goes so far as did the charge of the court upon this subject. *People v. Fitzsimmons* (Sess.), 34 N. Y. Supp. 1102; *State v. Jackson*, 103 Iowa, 702 (73 N. W. 467).

In the last-cited case it was held that there must have been the intention to do an unlawful act, and that such act resulted in the homicide.

The mere running of an automobile upon the public highway is not of itself unlawful. Can the mere fact that the jury found that the respondent exceeded the legal limit of 10 miles an hour at this particular point be of itself, independent of other facts connected

with it, sufficient to warrant a conviction? We think the better doctrine is that the question of the speed of the automobile should have been submitted to the jury, in connection with other facts, as bearing upon the question whether he was guilty of gross negligence in the manner in which he ran the automobile.

This court held, in the case of *Zoltovski v. Gzella*, 159 Mich. 620 (124 N. W. 527, 26 L. R. A. [N. S.] 435, 134 Am. St. Rep. 752), that the absence of a light on an automobile, in violation of the statute, was evidence tending to prove negligence; and it has been held in other courts that a failure to display headlights or sound a horn, as required by statute or ordinance, or both, constitutes negligence. *Ballard v. Collins*, 63 Wash. 493 (115 Pac. 1050).

While it might be said that the wilful violation of this statute would constitute negligence, it does not follow that such negligence would in a given case amount to gross negligence or manslaughter, under the circumstances of the case.

It was held by the supreme court of Nebraska in *Schultz v. State*, 89 Neb. 34 (130 N. W. 972, 33 L. R. A. [N. S.] 403, Ann. Cas. 1912C, 495), that one who drove an automobile wilfully, recklessly, carelessly, and negligently, *and* at a rate of speed forbidden by the statute, upon the public streets or highways of that State, and *thereby* caused the death of another, was guilty of criminal homicide. In that case, as here, the trial court called the jury's attention to the statute, and the supreme court said, in commenting upon that charge, as follows:

"It will be observed that this case is not prosecuted solely for a violation of the speed limit fixed by the statute, but is based in fact on the negligent, reckless, careless, and dangerous driving of his automobile by the defendant. In a recent case in Connecticut the defendant was found guilty of manslaughter in negli-

gently and recklessly driving his automobile over a man named Morgan. In that case the court took occasion to read to the jury the automobile act of that State, which is quite similar to the statutes of Nebraska regulating the use of automobiles on public streets and highways. It was claimed that it was error to read those statutes and apply them in that case; but the supreme court of Connecticut found no error in the instruction. It was there said:

"One who wilfully drives an automobile in a public street of this State at a rate of speed or in a manner expressly forbidden by statute, and *thereby* causes the death of another, or one who, with reckless disregard for the safety of others, so negligently drives an automobile in a public street as to cause the death of another, is guilty of criminal homicide.' *State v. Campbell*, 82 Conn. 671 [74 Atl. 927, 135 Am. St. Rep. 293, 18 Ann. Cas. 236]."

There seems to be no conflict in the decisions where the respondent is violating some statute, *and* where his manner is negligent and careless; the courts in such cases uniformly hold that he is guilty of manslaughter, if the death of some other person is the result.

Did the fact, if it be a fact, that respondent, at the time his automobile struck Mary Robb, was driving his automobile more than 10 miles an hour *thereby* cause her death? In other words, might not the death have occurred had the automobile been driven at 9 miles an hour? Did the unlawful rate of speed cause her death? We shall split no hairs as to whether the unlawful act to warrant a conviction of manslaughter must be one that is *malum in se*, as distinguished from *malum prohibitum*. Many courts do not recognize any distinction where the unlawful act is in its nature dangerous to human life, or where the unlawful act manifests an evil nature or wrongful disposition to harm or injure another in his person or property. See note to *State v. Horton*, 139 N. C. 588 (51 S. E. 945, 1 L. R. A. [N. S.] 991, 111 Am. St. Rep. 818), found in 4 Am. & Eng. Ann. Cas. 800.

In the *Campbell Case* the court said:

"The rule of law concerning contributory negligence by the injured person, as a defense in civil actions for damages for personal injuries, had no application to this case. The State was required to prove the alleged unlawful act of the accused and its consequences, but not that the deceased exercised due care to avoid the consequences of that unlawful act. The court did not, either by its refusal to charge as thus requested, or by the language used, give the jury to understand, as the defendant claims it did, that the conduct of the deceased was eliminated from the case. The court properly said to the jury that the State must clearly show that the deceased's death was the direct result of the defendant's negligence, but that the injured man's conduct became material only as it bore upon the question of such negligence of the accused, and that if the culpable negligence of the accused was the cause of Mr. Morgan's death, the accused was responsible under the criminal law, whether Mr. Morgan's failure to use due care contributed to his injury or not."

So we say here that, while the claimed contributory negligence of Mary Robb is no defense in this case, yet it does not follow that her conduct should be eliminated from the case; it should be considered as bearing upon the claimed culpable negligence of the respondent, and the question should all the time be: Was respondent responsible under the law, whether Mary Robb's failure to use due care contributed to her injury or not?

Eliminating the questions of recklessness and gross carelessness from the case, would it be claimed here that, because respondent was by one mile per hour exceeding the legal speed limit, he would be responsible for the death of Mary Robb, if in her excitement and confusion she jumped in front of the car at a time when it was physically impossible for the respondent to stop it before inflicting the injury? Would the mere fact that a car was being operated slightly in

excess of the legal speed limit make a respondent guilty of manslaughter if a person wilfully threw himself in front of the car and received injury? To ask these questions is to answer them in the negative. On the other hand, if this respondent were operating his car at the rate of 9 or 9½ miles an hour carelessly and negligently, and should by reason of gross negligence run over a little child sitting in the street, killing it, nobody would expect that he would be excused for his unlawful act. He could not claim that, because he was not violating the speed limit, he was not guilty of wilful and gross misconduct in causing the death of such child.

Did the death of Mary Robb occur as a direct and natural result of the exceeding of the speed limit by the respondent? In most of the cases cited, where it has been held that one who caused the death of another, while engaged in an unlawful act, was guilty of manslaughter, it appeared that the death resulted as the natural, direct, and necessary result of the unlawful act as, where one unlawfully assaults another and knocks him down, and, he falling upon some object, breaks his neck, the result is the natural, direct, and necessary result of the unlawful act; so it is in the cases of the careless use of firearms, where the unlawful act itself was wilfully performed, and was the natural forerunner of the resulting injury. The cases cited by the prosecution all bear out this proposition. The case of the unlawful administering of drugs is another instance of the application of the doctrine referred to. On the other hand, attention is called to the case of *People v. Rockwell*, 39 Mich. 503, where a person was convicted of manslaughter for killing one Wilber; the respondent was shown to have struck Wilber with his fist and knocked him down. It was not shown directly how Wilber was killed; but it appeared distinctly that the blow did not kill him. The

facts indicated that Rockwell kicked him after he fell, or else he was killed by a horse trampling on him. This court, upon reversing the conviction on the charge of the lower court which was unqualified, that if the blow was not justifiable, and Wilber so fell that the horse jumped and struck Wilber and killed him with his feet, or kicking him, respondent was guilty, said:

"It is impossible to maintain such a charge without making every one liable not only for natural and probable consequences, but for all possible consequences and circumstances which immediately follow a wrongful act. There was no necessary connection between the act of respondent and the conduct of the horse, which he cannot be said from the record to have been responsible for. And the case was not even put as permissive. The liability was laid down as positive. The conviction cannot be maintained."

So we say here, the charge of the court eliminated all necessary connection between the speed of the car and the death of Mary Robb.

In the case of *Potter v. State*, 162 Ind. 213 (70 N. E. 129, 64 L. R. A. 942, 102 Am. St. Rep. 198, 1 Am. & Eng. Ann. Cas. 32), it was held that the death of one of the participants in a friendly scuffle through the accidental discharge of a pistol carried in the pocket of the other, contrary to the provisions of the statute, could not be said to be caused by the performance of a wrongful act, so as to render the one carrying the pistol guilty of manslaughter, under the provision of the statute that whoever unlawfully kills a human being in the commission of some unlawful act is guilty of that crime. The court there said:

"It is undoubtedly true, as a general rule of law, that a person engaged in the commission of an unlawful act is legally responsible for all of the consequences which may naturally or necessarily flow or result from such unlawful act. But before this principle of law can have any application under the facts

in the case at bar, it must appear that the homicide was the natural or necessary result of the act of appellant in carrying the revolver in violation of the statute. * * *

"With equal reason and force it may be asserted that the mere fact that the accused was unlawfully carrying the weapon in question at the time it was accidentally discharged is not, under the circumstances, a material element in the case, for it is manifest that such unlawful act did not, during the scuffle between the parties, render the pistol any more liable to be discharged than though the carrying thereof had been lawful."

It was held in this State, in the case of *People v. Abbott*, 116 Mich. 263 (74 N. W. 529), that a person who, while doing or attempting to do an unlawful act, dangerous to human life, accidentally kills another is guilty of manslaughter at least, even though the act was not unlawful at common law. So held where the death of a woman pregnant, but not with a quick child, resulted from an attempt to procure a miscarriage by means of instruments, made punishable as a misdemeanor by statute.

We think there is a clear distinction in principle between that case and the instant case.

In this case, in order to warrant the conviction of the respondent, it should have clearly appeared that Mary Robb's death ensued as a direct and natural result of the reckless or gross negligence of the respondent. The crime sought to be proven was involuntary homicide, caused by culpable negligence, and, to make an act carelessly performed resulting in death a criminal one, the carelessness must have been gross, implying an indifference to consequences; and the term "gross negligence" means something more than mere negligence. It means wantonness and disregard of the consequences which may ensue, and indifference to the rights of others that is equivalent to a criminal intent.

Not every degree of carelessness or negligence, if death ensues, renders the party guilty of manslaughter. The case may be one of mere misadventure. To warrant conviction, it must be gross negligence. It has been well said that there is little distinction, except in degree, between a will to do a wrongful thing and an indifference whether it be done or not. Therefore gross negligence is criminal, and within limits supplies the place of affirmative criminal intent.

An unavoidable crime is a contradiction. Whatever is unavoidable is no crime. As in the law of civil wrongs, so in the criminal law, to render one answerable for an offense, it must result from his act as an effect not too remote but sufficiently proximate thereto.

To warrant a conviction of manslaughter, the conduct of the accused must have been the proximate cause of death, and must have been characterized by such a degree of culpable negligence as to amount to gross negligence; and that is a question for the jury.

The ultimate inquiry should be: Was the respondent criminally negligent, and, if so, did his criminal negligence cause the death of the deceased? *State v. Goetz*, 83 Conn. 437 (76 Atl. 1000, 30 L. R. A. [N. S.] 458).

We are of opinion that there was reversible error in the charge.

We have examined, but shall not discuss, the other assignments of error. Many of the questions discussed by counsel will not probably arise upon another trial in view of what we have said, and some of them are without merit. For the errors pointed out, the conviction must be set aside and reversed, and a new trial granted.

MCALVAY, C. J., and BROOKE, KUHN, BIRD, MOORE, and STEERE, JJ., concurred. OSTRANDER, J., did not sit.

WOLVERINE FARMS CO. v. DE YOUNG.

EMERY v. DE YOUNG.

BROKERS — APPEAL AND ERROR — CONTRACTS — COMPENSATION —
VENDOR AND PURCHASER — COMMISSIONS.

Evidence tending to show that plaintiff, a firm of brokers, agreed to effect an exchange of defendant's stock of hardware and a store building for other property for a stated commission; that a contract of exchange was executed but never carried out, contradicted by the testimony of defendant that the commission was to be paid if the deal went through, but not otherwise, *held*, to present a question of fact for the jury, as to the right to commissions; but both parties acquiescing in the statement of the trial court that it was agreed he should direct a verdict one way or the other, plaintiff could not complain or review a verdict directed against it.

Error to Montcalm; Davis, J. Submitted April 24, 1914. (Docket No. 134.) Decided July 25, 1914.

Assumpsit by John G. Emery and John L. Bailey, copartners as the Wolverine Farms Company, against Cornelius De Young for broker's commissions. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

Smedley, Linsey & Lillie, for appellant.

L. C. Palmer, for appellee.

STONE, J. The plaintiffs, John G. Emery and John L. Bailey, copartners, doing a real estate business, at Grand Rapids, under the name of Wolverine Farms Company, brought this suit to recover from the defendant a commission of \$200.

The declaration contains a special count and also the common counts in assumpsit. The plaintiffs claim to have acted as middlemen in bringing together the

defendant and one Stewart M. Rose, and that, by reason of the services of plaintiffs, the defendant and Rose came to an agreement and entered into a written contract in and by which said Rose agreed to trade a farm to the defendant in exchange for a stock of hardware and a store building owned by defendant.

The contract which the plaintiffs claim to have been instrumental in causing to be made was as follows:

"CRYSTAL, MICH., Feb. 11, 1913.

"It is hereby agreed between Cornelius De Young of Crystal, Michigan, party of the first part, and Stewart M. Rose of Rockford, Michigan, party of the second part. Witnesseth: The party of the first part agrees to buy from the second party his farm in Cannon township containing 239 acres of land at \$55.00 per acre. The party of the first part is to sell to the party of the second part all of his stock of hardware, implements, tools and store fixtures, at invoice price with freight and cartage added, damaged goods at actual value, stock to be inventoried at fair inventory, also hardware store building and land commencing at a point midway between the store and bank, thence west to the line, thence south and east to beginning. Consideration three thousand dollars. Exchange to be made by February 20th.

"CORNELIUS DE YOUNG.

"STEWART M. ROSE."

It is not claimed that either of the plaintiffs was present when the above contract was reduced to writing, but Mr. Bailey, one of the plaintiffs, had introduced the parties, and claims to have brought about the contract. The parties to the contract had exchanged visits, the properties had been examined, and the negotiations had resulted in the above contract of February 11, 1913. The contemplated inventory of stock was not made, and shortly after the date of the contract the defendant notified Mr. Bailey, one of the plaintiffs, that he would not make the deal, and the trade fell through. Upon the subject of commissions due the plaintiffs, Mr. Bailey testified that at the first

meeting of the parties to the contract, and as they were about to separate, he told defendant that plaintiffs' commission would be $2\frac{1}{2}$ per cent. on the value of defendant's sale, for him to pay, and that defendant said, "Well;" and that witness told Mr. Rose that he would have to pay $2\frac{1}{2}$ per cent. on the property he was selling. He further testified that Rose and defendant thought the above-named commission was too high, and that the last-named parties got together and agreed to pay plaintiffs \$400; one-half to be paid by Rose and one-half by the defendant. On direct examination of Mr. Bailey the following testimony was given:

"The last commission I was asking was \$400; \$200 to be paid by each.

"Q. Now, do you know whether or not that was conveyed to Mr. De Young, that information?

"A. Yes, sir. He told me so himself.

"Q. To whom did you make the reduction in the first place?

"A. To Mr. Rose. I think that reduction was made the 12th of February. It was the day before Mr. Rose went up there the last time.

"Q. Now, what was the talk with Mr. De Young when you were to have the \$400? When were you to have the \$400?

"A. It was due when they came to an agreement to trade. I never received the \$200. I made a demand on Mr. De Young for my commission. I sent him a registered letter. It is dated March 13, 1913. I never received a reply from Mr. De Young.

"Q. Did you have anything to do with fixing the price of the stock of hardware or the farm?

"A. No, sir.

"Q. Who was to make the arrangement of the prices, and so on?

"A. Mr. Rose made the price on his farm, and Mr. De Young made the price on his stock and store. It was to be an invoice price.

"Q. Did you have anything to do about making the

price or attempting to get a good price for either party?

"A. No, sir."

On cross-examination Mr. Bailey testified:

"Q. As a matter of fact, you did not understand you were entitled to any commission unless Rose and De Young made an absolute agreement to exchange their properties?

"A. Yes, sir.

"Q. You expected it anyway, whether they traded it or not?

"A. We expected our commission when the parties agreed to trade, when we had done our part."

Stewart M. Rose was called as a witness by the plaintiffs, and after testifying to the visits and examination of the properties, and referring to defendant's visit to see the farm, he said:

"We had a talk about the commission. Mr. De Young thought it was too much, and I thought it was too much.

"Q. What was too much?

"A. Two and a half per cent.

"Q. To be paid by whom?

"A. Each of us, on the valuation of our property.

"Q. When was it to be paid?

"A. Nothing said about that just then.

"Q. Do you know?

"A. I supposed when I made the trade.

"Q. When you made the agreement?

"A. Yes, sir. We both agreed that it was too much.

"Q. Anything said about seeing Bailey and getting it reduced?

"A. Yes, I said I would go and see Mr. Bailey and get it reduced. De Young said, 'All right.' Afterwards I saw Bailey. Mr. Bailey reduced it and agreed to take \$400; each to pay one-half. After that I saw Mr. De Young. I saw him the day we signed the contract, February 11, 1913.

"Q. At that time was there any talk about the commission Mr. Bailey was to receive?

"A. I told De Young what Bailey said, and, if I

understood him, he said, 'All right.' I told Mr. De Young Mr. Bailey would take \$200 apiece. I think De Young said, 'All right.' That was before we made the contract. We had this talk in the store. * * *

"Q. Was the deal carried out and completed and the properties exchanged?

"A. It was not.

"Q. Why?

"A. I got a telephone from Mr. Bailey, and he said it was all off. I was ready and willing to carry out my part of it in every respect and exchange the properties. I was ready and willing to carry out, up to and including the 20th of February. I was able to carry out the deal."

The plaintiffs called the defendant for cross-examination. After testifying as to the value of his stock and the reasons why the trade did not go through, and that he never paid plaintiffs any commissions, the following occurred:

"Q. You did not pay them 2½ per cent. of the \$16,000?

"A. I did not calculate I owed them.

"Q. You did not pay them \$200 afterwards?

"A. I did not.

"Q. You knew that was what they were expecting, \$200?

"A. That was not the agreement between Mr. Bailey and me. Bailey and I did not have any agreement.

"Q. Why did you say it was not the agreement made between you and Bailey?

"A. It was not the way he talked to me. I went over and visited the farm of Mr. Rose.

"Q. And you and Rose talked then that 2½ per cent. was too much?

"A. Yes, sir.

"Q. And Mr. Rose said he would go and see Bailey?

"A. Yes, sir.

"Q. And when he came up there to draw up the contract he informed you he had seen Bailey?

"A. He did.

"Q. And he informed you Bailey would take \$400?

"A. Yes, sir.

"Q. And he informed you you were to pay one-half of it, and he one-half of it; that was satisfactory to you?

"A. Yes, if the deal went through.

"Q. And you never paid that \$200?

"A. I did not."

We have quoted enough of the testimony to show that the parties did not agree as to when the commission was to be paid, if at all; the plaintiffs claiming that it was to be paid when the agreement for an exchange of properties was made, and the defendant testifying that it was to be paid when "the deal went through," and that it never went through. A question of fact was here presented for the jury. There was a conflict in the evidence also as to the reason why the trade did not go through. With the evidence in this condition, both parties claimed the right to a directed verdict. The court, after stating, in the presence of counsel, to which there was no objection, that "both parties ask for a direction of a verdict," directed a verdict for the defendant, and accordingly a verdict and judgment were entered for the defendant.

The plaintiffs have brought the case here for review, and errors are assigned:

(1) That the court erred in refusing to grant plaintiffs' motion to direct a verdict in their behalf.

(2) That the court erred in granting defendant's motion to instruct the jury to render a verdict for defendant for the reason that plaintiffs had offered no testimony showing a legal liability on the part of defendant.

An examination of the record satisfies us that the court did not err in refusing to direct a verdict for the plaintiffs, and they are not in a position to complain because the court did not submit the case to the jury. We have held that where, at the close of the testimony in a case, each party claimed that a verdict should be directed in his favor, and the court said to the jury

that it seemed to be agreed that it was the court's duty to direct a verdict one way or the other, to which statement no exception was taken, the defeated party could not urge on appeal that there were questions of fact on which he was entitled to go to the jury. *St. Mary's Power Co. v. Water-Power Co.*, 133 Mich. 470-478 (95 N. W. 554); *Peterson v. Mahon* (N. D.), 145 N. W. 596.

This renders it unnecessary for us to consider the other questions discussed by counsel, as we find no error in relation to the admission of testimony.

The judgment of the circuit court is affirmed.

MCALVAY, C. J., and BROOKE, KUHN, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

RICHARDSON v. DETROIT & MACKINAC RAILWAY CO.

1. NEGLIGENCE—CARRIERS — CONTRIBUTORY NEGLIGENCE—RAILROADS
—DIRECTED VERDICT.

Evidence, in an action for the unlawful killing of decedent, a passenger who was at a station intending to take a train of the defendant at night, *held*, to present an issue for the jury upon the alleged negligence of defendant railway company and the contributory negligence of the deceased. *Richardson v. Railway Co.*, 176 Mich. 413 (142 N. W. 832).

2. TRIAL—APPEAL AND ERROR—PRESUMPTIONS—JURY.

Unless the record indicates that the jury arrived at its verdict by an improper method, it will be presumed that the method was a proper one and that no irregular compromise was effected by the jurors in reaching the result, a verdict for plaintiff.

3. SAME—INSTRUCTIONS—COMPROMISE VERDICT.

It was not prejudicial error for the court to advise the jurors that the question of damages is necessarily a matter of compromise, or that it was a question of estimate; that verdicts in the class of cases that was before the court were always the result of compromises; cautioning them that they should not, however, forego their honest opinions. If he meant by the word compromise mutual concessions in computing unliquidated damages in the class of cases in which the damages were unascertained, and the court will so presume on error, the charge was not objectionable when no claim was made that the verdict exceeded a reasonable amount and the point was not presented on a motion for new trial.

Error to Arenac; Sharpe, J. Submitted June 3, 1914. (Docket No. 13.) Decided July 25, 1914.

Case by Wallace B. Richardson, as administrator of the estate of Edith I. Barhite, deceased, against the Detroit & Mackinac Railway Company for the unlawful killing of decedent. Judgment for plaintiff. Defendant brings error. Affirmed.

Henry, Henry & Henry (James McNamara, of counsel), for appellant.

B. J. Henderson (*De Foe, Hall & Converse*, of counsel), for appellee.

STONE, J. This case is before this court for the second time. When first here, we made a very full statement of the facts involved in the case, and, to avoid needless prolixity here, we will refer to our former opinion for such statement. 176 Mich. 413 (142 N. W. 832).

It is sufficient to say that the plaintiff, as administrator of the estate of Edith I. Barhite, deceased, an unmarried woman, sued the defendant in an action on the case, alleging that his decedent came to her death on the night of June 22, 1911, through the negligence of the defendant in the operation of its trains

at the village of Turner, Arenac county. When first here, the judgment was reversed for the reason that the trial court permitted the jury to base the damages awarded the plaintiff in part on the loss to a sister of decedent, as well as to the father and mother of decedent. The case was sent back for a new trial, which has resulted in a verdict and judgment for the plaintiff, and the defendant has again brought the case here for review, upon writ of error.

As stated by appellant, and as shown by a comparison of the two records, the testimony given on the second trial did not substantially differ from that submitted upon the first trial, except with respect to the duty of plaintiff's intestate to contribute toward the sister's support, which was eliminated upon the second trial.

Counsel for appellant in their brief say:

"In view of the thorough and exhaustive consideration given by this court to the questions raised on the former trial, we shall refrain from discussing at this time assignments of error under the subdivisions made by the opinion of this court in their former decision designated as 1, 3 and 5. We do not think the evidence on the last trial discloses a situation which would warrant us in urging this court (1) that the defendant was free from negligence. Nor do we deem it proper for us to urge in the light of the opinion of this court that (3) the death of the plaintiff's intestate was conjectural, and on the second trial, the judge having eliminated the question of damages (5) with respect to the duty of plaintiff's intestate to contribute towards her sister's support, assignments of error relative thereto will not be urged at this time."

Counsel confine themselves to the discussion of the claimed errors, which they have grouped as follows:

First. Admission of evidence. *Second.* Negligence of plaintiff's intestate. *Third.* Errors in charge of court. *Fourth.* Errors in refusing to instruct the jury as requested. *Fifth.* Instructions of the court after the jury had retired.

1. We find no error in the rulings of the trial court upon the admission of evidence. We think that no new question is raised upon this branch of the case that warrants discussion.

2. Upon the subject of the claimed negligence of plaintiff's intestate, we must adhere to our former opinion that it could not properly be disposed of as matter of law, and that the question was properly submitted to the jury. Counsel for appellant reargue the question, but we must hold that our former ruling has, under the record, become the law of the case.

3, 4. As to the claimed errors in the main charge of the court, and in the refusals to charge as requested, we would be justified in saying, not only that they are not discussed by counsel, but their discussion is unnecessary for the further reason that each question raised was presented to, and passed upon, by this court at the former hearing. The same charge, with the exceptions noted, was given at both trials.

5. Instructions of the court after the jury had retired. The errors in this connection are raised by the twenty-fifth, thirty-first, thirty-second, and thirty-third assignments.

The record shows that after the jury had been out for a time, and on the morning of September 18, 1913, they were brought in, and the following occurred:

"The Court: Mr. Foreman, haven't you yet agreed upon a verdict?

"Foreman: No, sir; we have not, your honor.

"The Court: I do not want you to tell me particularly, but as nearly as you can, do you disagree upon the question as to whether or not the defendant is liable?

"Foreman: No, sir.

"The Court: You just disagree upon the question of damages?

"Foreman: Yes, sir.

"The Court: I am just inclined, gentlemen of the jury, to instruct you a little further upon that. My instructions yesterday were read to you, and perhaps I didn't get the law as clear as I might have. I am very loath to discharge you for a disagreement for such a reason. I will preface what I say by saying that the question of damages, where there is nothing excepting the judgment of the jurors to fix it on, is, of course, where 12 men have to make it up, necessarily a matter of compromise. * * * As I have said to you, it is a matter of judgment; it is a question of estimate; it is not a question that when you have rendered a verdict and agreed upon it, any of you can say: 'Why, I know that is just the right amount.' It is impossible to do that. It is a question of exercising your best judgment about it, and, as I suggested to you, I don't think it is improper for me to say to you that verdicts in this class of cases are always the result of compromises. Why, it wouldn't be possible to get 12 men who would agree and say our judgment is all the same upon that, because there are so many probabilities to take into consideration.
* * *

"You have already deliberated a long time upon it, as long as we usually keep juries, but I am loath to discharge you in this case, and I do urge you, if possible, to try and get together upon a verdict. I don't mean by that that a jurymen must forego an absolutely honest opinion and render a verdict that is contrary to his idea of fairness and right. But I do urge upon you that it is important to both of these parties, and if the question of liability is determined—and you say it is—that the question of damages should be determined by you and this litigation, so far as this court is concerned, should end."

After this supplementary charge, the jury again retired, and the record states, "Jury return in a few moments," and announced a verdict in favor of the plaintiff for \$2,750 damages, upon which a verdict and judgment were entered.

The record does not disclose, as contended by counsel for appellant, that the jury had made any an-

nouncement that they were unable to agree, or that they had asked to be discharged. They seem to have been called in by the court upon its own motion. It is the claim of appellant that this portion of the record discloses that the verdict was not the result of the united judgment of the jury, but was the result of a compromise arrived at by the jury. We doubt if this claim is well founded. It must be presumed, in the absence of evidence, that the jury arrived at their verdict by a proper method. We think it may be fairly inferred from the record that the verdict may have been the result of the supplementary charge, although it does not distinctly appear. In stating that part of the supplementary charge upon which error is assigned, we have not set out all of such charge. Much of the language used by the court is not even criticised by appellant's counsel. Much of the supplementary charge was in the nature of caution to the jury, and they were told that they must not forego an absolutely honest opinion and render a verdict that was contrary to their idea of fairness and right.

Much stress is laid by counsel upon the trial court's use of the term "compromise," in fixing the amount of damages. In our opinion the expression was an unfortunate one, but it has often been stated in the books that in arriving at verdicts, where the damages are unliquidated, the result is often reached by the mutual concessions of individual jurors. It is true that it is often difficult for jurors to agree upon the precise amount of unliquidated damages to which the plaintiff is entitled; and we think that it was this that the court had in mind in referring to "this class of cases." A reference to 38 Cyc. p. 1845, will disclose the following language:

"Verdicts, it has been said, are often and properly the result of mutual concessions. Without something of this kind 12 men can hardly be expected to come

to a unanimous conclusion upon any computation of unliquidated damages. Where, as is usually the case, there is a diversity of opinion as to the amount which ought to be given, the verdict must necessarily be the result of mutual concession, and the jury are bound to seek for a medium sum upon which their conflicting views may harmonize."

If, by the term "compromise," the trial court meant the mutual concessions above referred to, then the language would not be objectionable.

Our attention has been called to the following cases in this court bearing more or less upon the subject:

In *Pierce v. Rehfuß*, 35 Mich. 53, after the jury had retired to deliberate and had been out five hours, they returned into court and announced their inability to agree upon a verdict. Justice MARSTON said:

"The court thereupon further instructed the jury as to their duty in endeavoring to reconcile their views and arrive at a verdict, if consistent with their consciences, rather than that the parties should be put to the trouble and expense of trying the case again; and this is complained of upon the ground that the court should not charge the jury the second time, after they return into court and say they cannot agree, unless they ask for further instructions on some point, and that the court should not urge the jury to agree, nor make any remarks to the prejudice of either side. This last, of course, the court should not do, and nothing in this case was said to the prejudice of either party, unless calling the attention of the jury to the propriety of their reconciling all differences of opinion, so far as they conscientiously could, and agreeing upon a verdict can be so considered, which we think cannot. It is usually for the interest of both parties, or at least should be, that when a case has been fairly tried and submitted upon the merits to a jury, they should agree and thus put an end to the controversy; and the court, in thus instructing the jury, was but acting in the performance of a highly commendable duty, and this irrespective of the fact whether the jury had asked for further instructions or not."

The judgment of the lower court was affirmed.

In *Goodsell v. Seeley*, 46 Mich. 623 (10 N. W. 44, 41 Am. St. Rep. 183), suit was brought against a physician for malpractice in setting plaintiff's arm. The record discloses that, after the jury had retired, they returned into court and informed the judge that they had not agreed, but "stood eleven to one, and divided on \$200." The judge thereupon told them:

"If that is the only difference, it would be better for the county and the parties on both sides that one or both sides yield so as to come together. It would be unfortunate for all to have a disagreement when the difference is so small."

And he asked them to get together if possible. In reversing the judgment, Justice COOLEY, speaking for this court, said:

"It is no doubt true that juries often compromise in the way here suggested, and that by 'splitting differences,' they sometimes return verdicts with which the judgment of no one of them is satisfied. But this is an abuse. The law contemplates that they shall, by their discussions, harmonize their views, if possible, but not that they shall compromise, divide, and yield for the mere purpose of an agreement. The sentiment or notion which permits this tends to bring jury trial into discredit and convert it into a lottery. It was no doubt very desirable to the public and to the parties that the jurors should agree if they could do so without sacrificing what any one of them believed were the just rights of the parties, but not otherwise."

In *Kelly v. Emery*, 75 Mich. 147 (42 N. W. 795), the action was assumpsit brought to recover the balance claimed by plaintiffs to be due them, under a written contract, for building a schooner for defendants and for extra work and material thereon. The defendants, with their plea of the general issue, gave notice of several matters of defense, including that of

defective construction, delay in completion, etc. In the course of its charge to the jury the court said:

"This case has already been tried once, and the amount involved is not very large, and the parties cannot afford to litigate it forever, and the county cannot afford to have them do it. You see it takes some time to try the case, and I hope you will be able to arrive at a conclusion, and settle the facts in the case, at least."

It was claimed that by this charge the jury were coerced into finding a verdict. Speaking for this court, Justice LONG said:

"This statement by the court could not have had any such effect. It was simply an admonition to the jury to agree, if possible, upon the facts of the case, and one which the court might very properly make.

"It appears that the case had once been tried, and on that trial the jury failed to agree, there being such a conflict of testimony.

"We do not see how this portion of the charge affected the verdict or had any influence in favor of or against either of the parties.

"It was important in that, as in other cases, the jury settle the disputed questions of fact arising on the trial; and the court, without intimating its opinion of the facts upon this part of the case, advised the jury that it was for the best interests of the parties, and would save costs to the county, if they could in that trial settle the facts in the case. No one could be prejudiced by this portion of the charge."

In *Benedict v. Provision Co.*, 115 Mich. 527 (73 N. W. 802), the action was assumpsit for work and labor performed. From a judgment for the plaintiff, the defendant appealed, and the question involved was one of the amount of the indebtedness. At the conclusion of the evidence, and after the charge of the court, the attorney for the plaintiff said:

"Inasmuch as your honor has told the defendant's claim, probably the jury ought to know that the plain-

tiff's claim is \$588.83; there is no dispute about that, if he is entitled to recover at all."

To which the court replied:

"I suppose the jury know about that."

The jury returned a verdict of \$398.77. Counsel for the defendant made a motion for a new trial upon the ground that the verdict was a compromise verdict, and therefore illegal, which the court overruled. Speaking for a majority of the court, Justice MONTGOMERY said:

"The principal question presented in this case is whether the verdict rendered should be set aside on the ground that it is a compromise verdict. There is no doubt that, where the record is such as to make it clear that the jury have reached the result by 'splitting differences,' neither party has had the benefit of their judgment, and such verdict ought not to be permitted to stand. See *Goodsell v. Seeley*, 46 Mich. 623 [10 N. W. 44, 41 Am. St. Rep. 183]. But this is quite a different proposition than the one suggested by the facts of this case, which is that, because the jury gave a verdict for a less sum than the plaintiff's testimony showed him entitled to, the defendant has the right to complain, and to insist that the verdict was reached as a compromise. The inference is not a necessary one from the premises. The verdict for the less amount may have been the result of a mistake in computation, or it may have been that the jury, on their own judgment, considered portions of plaintiff's testimony inherently improbable. It certainly does not appear in this case, as it did in *Goodsell v. Seeley*, *supra*, that the verdict was the result of a compromise."

We are not prepared to say that the defendant was prejudiced by the language of the court, and the plaintiff should not be penalized by such language, unless we are satisfied that the defendant was prejudiced by the use thereof. Had the court said to the jury that it was their duty, in so far as it was consistent with their consciences, to try to get together in agreeing

upon the amount of damages to be awarded the plaintiff, we do not think there would be any just criticism. We are not able to say from this record, as the court was able to say in *Goodsell v. Seeley, supra*, that the verdict was the result of a compromise, or that an attempt was made to induce a change of views against the judgment of the jurors.

There was no motion for a new trial; and there is no claim that the damages are excessive. It is only claimed for the verdict that it was substantially a verdict reached by the jury by "splitting differences," and in this claim we are not able to agree with counsel for appellant.

The judgment of the circuit court is affirmed.

MCALVAY, C. J., and BROOKE, KUHN, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

PRICE v. TOWNSHIP BOARD OF OAKFIELD TOWNSHIP.

1. MUNICIPAL CORPORATIONS — TOWNSHIPS — PRESIDING OFFICER — SUPERVISORS.

It is competent for any member of the township board to act as presiding officer, and in the absence of the supervisor one of the justices of the peace who has been called in as provided by 3 Comp. Laws, § 2344 (1 How. Stat. [2d Ed.] § 1401), may preside, and has the same authority as other members of the board.

2. SAME—INTOXICATING LIQUORS—BONDS—APPROVAL.

The presiding member of the township board who has voted once upon an application for approval of a liquor

bond may not cast an additional vote in the case of a tie, thereby disapproving the bond of the applicant; a double vote not being authorized by the statute.

3. INTOXICATING LIQUORS — LICENSE — APPROVAL OF BOND—RETAIL LIQUOR DEALERS.

It is the duty of the board or council to which the approval of liquor bonds has been delegated by statute, to determine in good faith whether the applicant has offered a bond sufficient in form and amount, and, if so, to approve it, although, in certain cases, the bonds of a surety company may be rejected if not satisfactory.

4. SAME—CONSTITUTIONAL LAW—TITLE.

In so far as Act No. 170, Pub. Acts 1911 (2 How. Stat. [2d Ed.] § 5062), attempts to confer authority on such board to reject sufficient bonds offered by retail liquor dealers, the effect of the act is to authorize prohibition and is beyond the scope of the title of the amended statute which, in terms, provides for the regulation and taxation of the business, not its prohibition.

Certiorari to Kent; Brown, J. Submitted June 9, 1914. (Calendar No. 26,267.) Decided July 25, 1914.

Mandamus by Raymond A. Price against the township board of Oakfield township to compel respondent to approve the retail liquor bond of the relator. An order was entered granting the writ: respondent brings certiorari. Affirmed.

Elvert M. Davis, for appellant.

Thompson & Temple, for appellee.

STONE, J. This case is before us upon a writ of certiorari to review the action of the circuit court in a mandamus proceeding instituted by relator to compel the township board to reconvene and approve a liquor bond of relator. For some time prior to instituting such mandamus proceeding the relator had

been engaged in the business of a retail liquor dealer, conducting a saloon at Harvard, in said Oakfield township. Desiring to continue such business, he, upon due application, presented his bond for approval. In his petition for mandamus the relator stated that, on April 27, 1914, the said board being duly convened with all its members present, a motion was made to support and approve said bond, when counsel for relator, and in his behalf, asked if there was any objection to the manner in which relator had conducted said business, to which inquiry the said board, by its members individually, answered that there was none; that said counsel then asked if there was any objection to the bond, when the said board replied there was none; that thereupon the supervisor stated that there was no objection, but that he did not want a saloon at Harvard, whereupon the said board proceeded to vote upon said motion; that, upon the vote being had, two of its members, to wit, E. Griswold and J. C. Berry, voted, "Yes," and two of its members, to wit, Seth C. Partridge and George Lewis, voted, "No," and thereupon said Seth C. Partridge, supervisor, declared the same to be a tie vote, and he then and there voted, "No," and also declared the motion lost. Upon the hearing in the mandamus proceeding the circuit court held that the supervisor had no power to cast a second vote upon the motion under consideration, and issued the writ of mandamus as prayed for. In his application for the writ of certiorari the supervisor, in behalf of the township board, stated that by the vote above set forth—two in the affirmative and two in the negative—there was a tie in the vote, and that he, as presiding officer, again voted, "No," and then and there declared that the said bond had been rejected by a majority vote of said township board.

It is alleged that the circuit court erred in finding, as matter of law, that:

(a) The said supervisor was not authorized, as presiding officer of said board, and also as a lawful member of said board, to vote first upon the question of the approval of the said bond, and, in case of a tie vote upon such question, to vote as presiding officer and cast a vote for the purpose of breaking such tie; (b) that the circuit court was in error in finding, as matter of law, that the said liquor bond was not, by the action of the township board at such meeting, rejected by a majority vote of such board.

It appears from the record, as well as from the briefs of counsel, that the circuit court and counsel for both parties considered that the question of the rejection of the bond of relator by said board was involved in the proceeding. The following questions are discussed by counsel:

(1) Has a supervisor, acting as a member of a township board at a meeting thereof where he is presiding, the right to cast a deciding vote (or vote to break a tie) where he has already voted in producing the tie vote?

(2) Has a township board the constitutional right to reject by a majority vote any or all liquor bonds presented to it for its approval?

I. Section 18 of Article 8 of the Constitution provides that there shall be elected annually in each township one supervisor whose powers and duties shall be prescribed by law.

Section 2343, 1 Comp. Laws (1 How. Stat. [2d Ed.] § 1401), provides that the supervisor, the two justices of the peace whose terms of office soonest expire, and the township clerk, shall constitute a township board, any three of whom shall constitute a quorum for the transaction of business.

The next section of the statute provides that when, from any cause, there shall not be three of the officers

constituting such board, competent or able to act, one of the remaining justices, on being notified by any member of said board, shall meet with any members of the board and shall have the same authority as the other members of the board.

It has been held by this court that in case a justice is thus called in, the board thus constituted has all the powers of the statutory board. *First Nat. Bank of St. Joseph v. St. Joseph Township*, 46 Mich. 526 (9 N. W. 838).

The legislature has never made any provision as to which member of the township board shall be the presiding officer. The voting powers of the members of the board appear to be equal. We have no doubt that it is perfectly competent for any member of the board to preside over its deliberations. If the supervisor were absent and one of the remaining justices should be called in, we have no doubt that it would be perfectly legal for such justice to act as presiding officer, for the statute says that "he shall have the same authority as the other members of the board."

Our attention has not been called to any case where, under such circumstances as appear here, any member of the body may have the right to a casting vote. Authority may be found to the effect that the right of such casting vote may be given by express statute.

Our attention has been called by appellant to *Whitney v. Village of Hudson*, 69 Mich. 189 (37 N. W. 184). There express power was given by the charter; and it was held that the charter of a village, whose common council is composed of the president and six trustees, and which provides that in proceedings of the council each member present shall have one vote, and when there shall be a tie the president shall give the casting vote, makes the president a voter upon every question, and in the case of a tie he has an additional vote.

Our attention has also been called to *People v. Church of the Atonement*, 48 Barb. (N. Y.) 603. Here, also, express authority was given by statute. There the section of the statute relative to religious corporations provides that no board of trustees should be competent to transact any business—

“Unless the rector, if there be one, and at least one of the church wardens, and a majority of the vestrymen, be present; and such rector, if there be one, and if not, then the church warden present, or if both the church wardens be present, then the church warden who shall be called to the chair * * * shall preside at every such meeting or board, and have the casting vote.”

Under this statute it was held that the term “casting vote” should be construed as authorizing the chairman, after having first voted with the rest, upon a tie occurring, to give a second vote. In the course of the opinion it is expressly stated that it is true that a double vote is not allowed in corporate meetings, except by express statute.

After examination of all the authorities cited, we are of opinion that upon this branch of the case the circuit court reached the correct conclusion, and for this reason alone the judgment below should be affirmed.

II. We might perhaps stop here; but as the question of the right of the township board by a majority vote to reject any or all such bonds presented to it for approval may be said to be involved here, we will consider it.

The statute relied upon by appellant consists of an amendment, found on page 288 [Act No. 170], Public Acts of 1911, in section 8 of the act, which reads as follows (2 How. Stat. [2d Ed.] § 5062):

“The township board of any township, the board of trustees of any village, or the common council of any

city may, by a majority vote, reject any or all such bonds presented to them for their approval."

It has been repeatedly held by this court that it is the duty of a board or council under the statute, before the amendment of 1911, to honestly and in good faith determine whether, under the terms of the statute, the bond offered be sufficient in form and penalty, and whether the sureties possessed the requisite qualifications, and if these requirements were met, it was the duty of the board or council to approve the bond, and that an arbitrary refusal to do so might be redressed by a mandamus proceeding at the prayer of the party tendering such statutory bond. *Farr v. Anderson*, 135 Mich. 485 (98 N. W. 6) ; *Power v. Common Council of Litchfield*, 141 Mich. 350 (104 N. W. 664) ; *Hanold v. Common Council of Stambaugh*, 163 Mich. 242-244 (128 N. W. 233).

The duty which the legislature has placed upon the common council or board is to determine whether the applicant has brought himself within the terms or conditions imposed by the statute. If the applicant has done this, his application should be granted and bond approved. What we have here said should not be construed as in any way conflicting with our decisions relating to the acceptance and approval of surety company bonds in certain cases, of which *Schmitt v. Common Council of Clinton*, 111 Mich. 99 (69 N. W. 153), and *Hicks v. Village of Perry*, 151 Mich. 88 (114 N. W. 682), are samples.

It is the duty of the board or council to act fairly and in good faith, and not captiously, in the approval of bonds. It is its duty to investigate the responsibility of the sureties; and, when it appears that this has been done and the investigating body is satisfied that the proposed sureties are irresponsible for the amount of the bond, or that the bond is not in the statutory form, the same should be rejected.

If this were all that is claimed for the amendment of 1911, above quoted, then it would be within the title of the act. But if it is claimed for the amendment that it gives to the board or council the power arbitrarily to reject any or all bonds without reference to their legal sufficiency, or the responsibility of the sureties, it cannot be sustained, for that would amount to prohibition; and this court has repeatedly held that provisions for prohibiting the liquor traffic are not germane, and cannot be legally enacted under a title expressing the object as being to regulate it, etc. *People v. Gadway*, 61 Mich. 285 (28 N. W. 101, 1 Am. St. Rep. 578); *Robison v. Miner*, 68 Mich. 549 (37 N. W. 21); *In re Hauck*, 70 Mich. 396 (38 N. W. 269); *Timm v. Common Council of Caledonia Station*, 149 Mich. 323-325 (112 N. W. 942); *Brown v. Common Council of Sparta*, 167 Mich. 492-494 (133 N. W. 527).

While the courts will presume in favor of the constitutionality of a law until the contrary clearly appears, such presumption cannot obtain or prevail as to a provision like the one under consideration, where plenary power is sought to be given to a council or board "to reject any or all bonds," the same being not germane to the title of the act which the provision seeks to amend. The title of the act in question is as follows:

"An act to provide for the taxation and regulation of the business of manufacturing, selling, keeping for sale, furnishing, giving or delivering spirituous and intoxicating liquors and malt, brewed or fermented liquors and vinous liquors in this State, and to repeal all acts or parts of acts inconsistent with the provisions of this act."

We are forced to the conclusion that this provision is neither within the entitling of the act nor within

the scope or purview of the statute which it seeks to amend, and is inconsistent with the other provisions of the act.

The judgment of the court below is affirmed.

MCALVAY, C. J., and BROOKE, KUHN, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

KUSHLER *v.* WEBER.

1. CORPORATIONS—DEEDS—EJECTMENT—TITLE.

No title to land was conveyed by a resolution of the board of directors of the holder of the fee, a corporation, to sell the land for a given consideration, authorizing the officers to sign the proper deeds of conveyance, which, however, were not shown to have been executed.

2. VENDOR AND PURCHASER—HOLDER IN DUE COURSE—POSSESSION—NOTICE.

Notice of the claim of a party in possession of land is sufficiently shown by the existence of a barn standing on the strip that was the subject of dispute.

3. DEEDS—DESCRIPTION—QUANTITY.

Where plaintiff, in ejectment, claimed a parcel of land described in the declaration, by virtue of a deed of the east five acres of land, and defendant claimed title under a deed transferring the westerly 75 acres, neither deed including the strip in controversy between plaintiff and defendant 57 feet wide, and plaintiff did not show any conveyance to him of the intervening parcel, although he obtained quitclaim deeds of the persons who had occupied this strip, plaintiff was not entitled to recover: the rule that plaintiff must recover on the strength of his own title, not on the weakness of the defendant's, is applicable to the case.¹

¹ On the question of the general rule that plaintiff must recover, if at all, on the strength of his own title, see note in 18 L. R. A. 781.

Error to Oakland; Smith, J. Submitted June 22, 1914. (Docket No. 51.) Decided July 25, 1914.

Ejectment by Adolph Kushler and another against John H. Weber and another. Judgment for plaintiffs: defendants bring error. Reversed.

Fred A. Baker, for appellants.

Davis & Bromley, for appellees.

STONE, J. This is an action of ejectment to recover a strip of land 57 feet wide near the easterly end of the N. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of section 29, in township of Royal Oak, in Oakland county. The plaintiffs and defendants both claim title by mesne conveyances from the Oakland Place Land Company, a corporation, as their common grantor. The said company was possessed of 200 acres of land, more or less, according to government survey, consisting of the W. $\frac{3}{4}$ of the N. W. $\frac{1}{4}$ of section 28, and the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 29.

Upon the trial the plaintiffs introduced in evidence the following instruments:

(1) A deed from the Oakland Place Land Company to William C. Connolly and Anna Connolly, his wife, dated April 6, 1906, and recorded May 1, 1906, in the office of the register of deeds of Oakland county, conveying the easterly 5 acres of the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 29, the W. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, and the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 28, all in town 1 north, range 11 east, being 125 acres, more or less, according to United States government survey.

(2) Also a warranty deed from the Oakland Place Land Company to Maurice M. Kenney and Letitia Kenney, his wife, dated the 6th day of April, 1906, and recorded April 11, 1906, in the office of said reg-

ister of deeds, conveying the westerly 75 acres of the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 29, town 1 north, range 11 east, according to government survey.

In connection with the foregoing deeds, plaintiffs' counsel introduced in evidence a resolution adopted by the board of directors of the Oakland Place Land Company April 26, 1906, reading as follows:

"Resolved, that this company exchange with W. C. Connolly and others the right to the following described property situated in the county of Oakland, Michigan: The north half of the northeast quarter of section 29, and the west half of the northwest quarter of section 28, and the west half of the east half of the northwest quarter of section 28, town 1 north, range 11 east, being 200 acres, more or less, according to government survey, free and clear from incumbrances."

—in exchange for certain property in the city of Detroit, therein described.

(3) Also a deed from William C. Connolly and Emma Connolly, his wife, to Frank F. Leska and Matilda, his wife, and Adolph Kushler and Anna, his wife, dated the 22d day of October, 1906, and recorded on the 10th day of November, 1906, in the office of the said register of deeds, conveying: Commencing at the northeast corner of the N. E. $\frac{1}{4}$ of section 29; thence westerly on westerly line 164 feet; thence southerly on a line parallel with the east line of said section 1,331 feet; thence easterly parallel with north section line 164 feet to the east line of said section; thence northerly on section line 1,331 feet to place of beginning, containing five acres.

(4) A deed from Frank Leska and Matilda Leska, his wife, to Adolph Kushler and Anna Kushler, his wife, dated August 28, 1912, and recorded September 2, 1913, in said register's office, conveying lot 13 of the survey and unrecorded plat of the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 28, the W. $\frac{1}{2}$ of the E. $\frac{1}{4}$ of the

N. W. $\frac{1}{4}$ of section 28, and the easterly five acres of the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 29, all in town 1 north, range 11 east, 125 acres, more or less; the said lot 13 containing 5 acres.

(5) A deed from Letitia Kenney, survivor of herself and husband, Maurice M. Kenney, who died July 7, 1908, to John Henry Weber and Sophia H., his wife, dated March 1, 1911, and recorded May 15, 1911, in said register's office, conveying the westerly 75 acres, more or less, of the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 29, situated on the south side of 10-mile road and lying west of Woodward avenue.

The controversy in this case arises from the fact that the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 29 contains more than 80 acres of land. Lying between the plaintiffs' east 5 acres and defendants' west 75 acres there is a strip 57 feet wide and 1,331 feet long containing 1.75 acres, which is the strip in dispute.

The Oakland Place Land Company never executed a deed of the 57-foot strip or any part of it to any one; but its board of directors on May 8, 1906, adopted a resolution as follows:

"Resolved, that this company sell and convey the balance of the Oakland county farm to the Citizens' Savings Bank for twelve thousand (\$12,000) dollars, and the officers of this company sign a certain paper to convey said property, and we will take up all the bonds of said company for \$12,000."

There was no evidence that the Oakland Place Land Company ever did execute any such conveyance. When the fact of the excess was discovered, plaintiffs' grantors sought to remedy the matter by obtaining from William C. Connolly and wife, in 1913, additional quitclaim deeds covering the disputed strip, and those deeds were offered in evidence. If, however, Connolly and wife had only obtained title to the five acres, they had already deeded that holding, by con-

veyance No. 3, above set forth, and the subsequent conveyances were ineffective.

A deed was also obtained in 1913 of the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 29, excepting the westerly 75 acres, from the Citizens' Savings Bank to plaintiffs' grantor, but there is no evidence that the Savings Bank had any title to the land. It certainly could get no title by the above resolution.

At the time of the last deed to plaintiffs, the defendants had a barn standing in part on the disputed strip. This was notice of their claim.

Soon after the deeds described as Nos. 1 and 2 were executed, Mr. Connolly employed a surveyor to make a survey of the easterly five acres. He found the northeast corner of section 29 and the quarter post half a mile south, and they were $161\frac{1}{2}$ feet more than half a mile apart; near the middle he found an old fence, a little further south than the exact middle, which he took as the south line of the N. $\frac{1}{2}$, which made the line 20 chains and 15 links, or 1,330 feet, long; on a true 80 acres, 5 acres would be 165 feet wide; the surveyor gave Connolly 164 feet wide. He testified that he made the survey at the request of Mr. Connolly, who claimed to own the land, and the surveyor put a stake at each of the west corners and blazed a tree on the line.

At the close of the evidence, the defendants requested the court to charge the jury as follows:

"First. Plaintiff, not having a quitclaim deed from the Oakland Place Land Company, has no title to the strip of land in question, and your verdict should be for the defendants.

"Second. Quitclaim deed from the Citizens' Savings Bank, introduced in evidence by the plaintiffs, conveys no title, because the Citizens' Savings Bank at that time had no title to convey.

"Third. Said quitclaim deed also conveys no title because the Citizens' Savings Bank at that time was not in possession of the strip of land in question.

· *"Fourth.* It appears by the evidence in this case that, after the execution of the deeds April 6, 1906, to William C. Connolly and wife and to Maurice M. Kenney and wife, Mr. A. H. Wilmarth was employed by William C. Connolly to make a survey of the easterly 5 acres on section 29, and he did make a survey and put a stake at each end of the westerly line and made a blaze on a tree on the line, thereby leaving for Mr. Kenney the balance of the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 29, and that Kenney built a barn within 42 feet of said west line so surveyed and staked out.

"Fifth. Under the circumstances, the said survey and staked line must be regarded as the true boundary between the easterly 5 acres and the westerly parcel of land described as the westerly 75 acres in the deeds of April 6, 1906.

"Sixth. The quitclaim deeds from William C. Connolly introduced in evidence (two of them) by the plaintiffs convey no title, because William C. Connolly and wife had no title to it."

"Eighth. The deed from the Oakland Place Land Company April 6, 1906, to William C. Connolly and wife contained this description:

"The easterly five acres of the north half of the northeast quarter of section 29, the west half of the northwest quarter of section 28, and the westerly half of the east one-half of the northwest quarter 28, all in town 1 north, range 11 east, containing 125 acres, more or less, according to government survey."

"The easterly five acres is a definite description by quantity, and the words 'more or less' must be applied to land on section 28, because it says 'the easterly five acres;' that is absolutely definite; and then it goes on and gives the government subdivision and says 'more or less.'

"Ninth. The deed from the Oakland Place Land Company in 1906 to Kenney and wife reads:

"The westerly 75 acres of the north half of the northeast quarter of section 29, town 1 north, range 11 east, according to United States government survey."

"This description is also a definite quantity, but it appears by the undisputed evidence in this case that said north half was more than 20 chains wide; there was an overrun about 10 feet.

"Tenth. It appearing that the Oakland Place Land Company on April 6, 1906, executed two deeds, one for the easterly 5 acres and the other for the westerly 75 acres. If this overrun was apportioned between the two deeds, the deed conveying the 5 acres would be entitled to one-sixteenth of the overrun and a deed conveying 75 acres would be entitled to fifteen-sixteenths of the overrun.

"Eleventh. If the overrun is not to be apportioned between these two descriptions, as stated above, and descriptions are to be construed as definite descriptions in quantity of only 5 acres in the one deed and 75 acres in the other, then the legal title to the strip between the two parcels is in the Oakland Place Land Company, and, as the plaintiff has no quitclaim deed from the Oakland Place Land Company, the plaintiff cannot recover.

"Twelfth. In construing these descriptions, the court is bound by the language used, and, if it was the intention of the Oakland Place Land Company to convey the whole of the N. $\frac{1}{2}$ of this quarter section, they never carried those intentions into effect and never executed a deed that would cover the overrun on a strip between the two parcels of land that is claimed by the plaintiffs in this case."

Each of the foregoing requests was refused, and the court directed a verdict for the plaintiffs. In directing the verdict and speaking of the plaintiffs' title, the court said:

"But, while I am not able to say that it is a very strong title, yet I am of the belief, in an action of ejectment, it is sufficient to prevail."

A verdict and judgment for the plaintiffs were duly entered, and the defendants have brought the case here, assigning errors on the refusal of the court to charge the jury as requested and in directing a verdict for the plaintiffs.

In our opinion the plaintiffs are in no position to recover in the case, and we think that the court erred in directing a verdict in their behalf. The easterly 5 acres is a definite description by quantity, and we

think the words "more or less" must be applied to the land on section 28. The easterly 5 acres are specifically described, and the description must be considered as a quantitative one. This is equally true of the description of the west 75 acres.

In ejectment the plaintiff must recover, if at all, upon the strength of his own title. We find no evidence in the record that the plaintiffs have ever obtained title to the strip of land in controversy. We think the court should have given defendants' first, second, third, sixth, eighth, ninth, eleventh, and twelfth requests.

The judgment of the court below is reversed, and a new trial granted.

MCALVAY, C. J., and BROOKE, KUHN, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

JEUP v. STATE FIRE MARSHAL.

1. CONSTITUTIONAL LAW — THEATERS — FIRE INSPECTION — LOCAL ACTS—SPECIAL LEGISLATION.

A statute regulating the operation and construction of theaters and moving picture shows, providing for inspection by the State fire marshal and the issuance of a license, is not local legislation in conflict with the provisions of the Constitution forbidding the enactment of local or special acts or the constitutional requirements for municipal charters and local self-government. (Act No. 257, Pub. Acts 1913.)¹

¹As to regulations affecting moving pictures, see note in 40 L. R. A. (N. S.) 193.

2. APPEAL AND ERROR—CONSTITUTIONAL QUESTIONS—PLEADING.

Questions relating to the constitutionality of a legislative enactment, not presented to the trial court in the bill of complaint filed to enjoin the enforcement of the statute, will not be considered on appeal unless the record in some manner discloses that the points were raised in the trial court.

Appeal from Wayne; Hally, J. Submitted June 15, 1914. (Docket No. 96.) Decided July 25, 1914.

Bill by Peter Jeup and others against John T. Winship, State fire marshal, and others, for an injunction. From an order overruling a demurrer to the bill of complaint, defendants appeal. Reversed.

May & Dingeman, for complainants.

Grant Fellows, Attorney General, and *F. Carew Martindale*, Assistant Attorney General, for defendants.

KUHN, J. The complainants are the owners of a lease of certain premises situate in the city of Detroit being operated as a picture and vaudeville theater. The defendant Winship is the State fire marshal, the defendant Robinson is assistant fire marshal, defendants Shaffer and Walker are State fire deputies, and the defendant Dupont is the city building inspector of the city of Detroit. The defendants insist that the premises are subject to inspection under Act No. 257 of the Public Acts of 1913. The complainants, by their bill, assail this act as conflicting with their constitutional rights, on the following grounds:

(1) Because it is in violation of article 5, section 30, of the revised Constitution, which provides that "The legislature shall pass no local or special act," etc.; (2) because it is in violation of the right of local self-government of the city of Detroit; (3) because it is in violation of article 8, section 20, of the revised Constitution, which provides for "A general law for the incorporation of cities," etc.; (4) because it is

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in violation of article 8, section 21, of the Constitution, which provides, "The electors of each city and village shall have power and authority to frame, adopt and amend its charter," etc.

Complainants seek a permanent injunction against the threatened action of the defendants to close their theater. To this bill the defendants, by the attorney general, demurred. The demurrer was overruled, and from this order defendants appeal. The learned circuit judge was of the opinion that matters of fire and fire protection are matters of purely local concern, relying upon the case of *Davidson v. Hine*, 151 Mich. 294 (115 N. W. 246, 15 L. R. A. [N. S.] 575, 123 Am. St. Rep. 267, 14 Am. & Eng. Ann. Cas. 352), as authority for this conclusion. In that case the court had under consideration the validity of a local act, with reference to the establishment of a bureau of public safety in the city of Bay City, providing that its membership should be appointed by the governor. The case turned upon the power of the State to take from the people the selection of such a board and place it in the hands of the governor. The question of whether Act No. 257, Pub. Acts 1913, which is not a local act, and which is a regulatory, licensing enactment under the police power of the State, is in conflict with the right of local self-government, was passed on by this court in the recent case of *Jewell Theater Co. v. State Fire Marshal*, 178 Mich. 399 (144 N. W. 835). It was decided that the act was a valid exercise of the police power of the State by the legislature.

In the brief of complainants there are raised the questions that the inspection fee is excessive, and that the act is invalid because there is lodged with the fire marshal a certain amount of discretion as to the number of inspections he may see fit to make. There is no intimation in the bill of complaint, nor can we find from the record, that these questions were raised in the court below, or relied upon until this case reached

this court. Under these circumstances we will not now consider these questions.

The order overruling the demurrer is reversed. An order will be entered sustaining the demurrer, and the record will be remanded to the court below.

MCALVAY, C. J., and BROOKE, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

MICHIGAN RAILROAD COMMISSION *v.* DETROIT &
MACKINAC RAILWAY CO.

1. MANDAMUS — RAILROADS — PUBLIC SERVICE COMMISSION — ENFORCEMENT OF ORDERS.

Mandamus is the appropriate remedy to compel the Detroit & Mackinac Railway Company to comply with an order of the Michigan railroad commission fixing rates for the transportation of timber and logs over certain branches of the respondent.

2. SAME—SUIT PENDING—EQUITY JURISDICTION.

The effect of another suit pending, involving similar questions, is usually to prevent the issuance of the writ of mandamus, unless the suit will be ineffective or the court in which it is instituted is without jurisdiction.

3. RAILROADS—MANDAMUS—SUIT PENDING.

Where a railroad company applied to the circuit court of Wayne county to restrain the enforcement of an order of the Michigan railroad commission, and relief was denied and the decree affirmed on appeal, and an appeal to the Supreme Court of the United States was refused, after which the company filed an original bill for an injunction in the United States district court and took an appeal from the decree denying relief as against the order of the com-

mission, the respondent must be held to have elected a forum for the trial of the controversy by filing suit in the State courts and was not in a position to make application thereafter to the Federal court on the contention that it had jurisdiction of the legal questions involved.

4. SAME—COURTS—FEDERAL JURISDICTION.

The tribunal which first obtains jurisdiction of a question which may be passed upon either in a State or in a Federal court, obtains and holds exclusive jurisdiction, until the power of the court is exhausted.

5. SAME—LEGISLATIVE QUESTION.

The determination of the question of the validity of such order was not a legislative, but a judicial, question.

6. SAME—MANDAMUS.

Where the application of relator to the Federal court had been denied, upon the ground that the State courts properly had jurisdiction of the questions involved, at the election of the railroad corporation, mandamus would issue to enforce the order.

Mandamus by the Michigan railroad commission and others against the Detroit & Mackinac Railway Company to compel the respondent to comply with a finding and order of the commission. Submitted June 16, 1914. (Calendar No. 26,229.) Writ granted July 25, 1914.

Gillett & Clark, Grant Fellows, Attorney General, and *David H. Crowley*, Assistant Attorney General, for relators.

Fred A. Baker and *James McNamara*, for respondent.

STONE, J. This is an application on the part of relators for a writ of mandamus to compel the respondent railway company to put in force certain orders adopted by the Michigan railroad commission.

We compile a brief statement of the proceedings leading up to this application: On October 19, 1909, October 22, 1909, and November 3, 1909, the Michigan

railroad commission made and promulgated certain orders fixing rates to be charged by respondent for the transportation of logs over certain portions of its line. After the entry of such orders the respondent filed a bill in the circuit court for the county of Wayne, in chancery, praying that court to set aside and vacate the orders theretofore made and entered by said commission. Upon a full hearing in that court a decree was entered dismissing respondent's bill of complaint. Upon appeal to this court the decree of the Wayne circuit court, in chancery, was affirmed on July 22, 1912. *Detroit & Mackinac R. Co. v. Railroad Commission*, 171 Mich. 335 (137 N. W. 329).

Thereafter application was made by respondent to this court, and also to one of the justices of the Supreme Court of the United States, for the allowance of a writ of error to the Supreme Court of the United States. Both applications were denied in August, 1912.

Thereafter respondent filed an original bill of complaint in the district court of the United States for the eastern district of Michigan, in equity, which bill contained practically the same allegations as the bill theretofore filed in the circuit court for the county of Wayne, in chancery, asking for the same relief, and praying further that a temporary injunction be granted restraining relator Michigan railroad commission from putting into effect and enforcing the orders theretofore made and entered by said commission, pending such hearing in the Federal court. This matter was heard upon motion for the temporary injunction above mentioned by two circuit judges and the district judge. The injunction was refused; one of the reasons stated in the opinion rendered for such refusal being that respondent's right of review in court became fixed when the orders of the commission were formulated, and that respondent at that time

could have resorted to any court of competent jurisdiction; that, having selected the Wayne circuit court, in chancery, as its forum, and having submitted its controversy to such court, a decree having been rendered against respondent in such court, which decree was subsequently affirmed by this court, the Federal court would, in view of these facts, have no jurisdiction to pass anew upon the subject-matter.

An appeal was subsequently taken from this order denying the temporary injunction to the Supreme Court of the United States, where the matter is now pending.

The instant proceeding is brought for the purpose of compelling, by mandamus, compliance with the orders made by the railroad commission under dates above set forth.

The answer of respondent admits, in substance, the foregoing; and it also admits that it has not put into force and effect the said orders of the commission, and states that it does not desire to do so before the case is finally decided in the Supreme Court of the United States. And respondent denies that relators have a right to have the said orders put into force and effect. In other words, it appears that the allegations in the petition of the relators are admitted, except the right of relators to have the orders put into force and effect.

The answer of respondent is voluminous, and raises many questions of fact which have already been settled by the decree and opinion of this court, and by the opinion of the Federal judges on the hearing for a preliminary injunction.

Relators claim that many of the matters raised by respondent are irrelevant and immaterial in this proceeding, and that the petition filed by relators does not legally raise any such issues, and does not justify the filing of an answer of this nature. Subsequent to the time of respondent's appeal to the Supreme

Court of the United States from the order of the United States district court refusing a temporary injunction, a motion was made in this court by relator Michigan railroad commission to amend the decree theretofore made and entered in the case of *Detroit & Mackinac R. Co. v. Railroad Commission*, *supra*. The relief sought by such proposed amendment was to the effect that the orders of the commission heretofore mentioned be decreed to be immediately put into effect. This motion was denied by this court on December 20, 1913 (178 Mich. 250, 144 N. W. 689), the reason for such denial being that, inasmuch as no affirmative relief was asked for or granted defendant in the lower court, and no appeal having been taken by the commission, the practice would not permit an amendment affording affirmative relief. In rendering this opinion this court very fully discussed the various questions raised, reaffirmed the position theretofore taken with respect to respondent's contentions, and pointed out that the remedy should be under section 47 of Act No. 300 of the Public Acts of 1909, which provides as follows:

"In addition to all the other remedies provided by this act for the prevention and punishment of any and all violations of the provisions hereof and of all orders of the commission, * * * and likewise any persons, firm or corporation interested, may compel compliance with the provisions of this act and with the orders of the commission by proceedings in mandamus, injunction or by other appropriate civil remedies."

On the hearing of the last above-mentioned matter the point was made, among others, by respondent, that an application for mandamus should not be entertained by this court while the appeal is pending in the Supreme Court of the United States, and this question was left open by us, which question we think now is fairly presented to this court.

From the above-quoted section of the statute it appears that the legislature intended mandamus as an appropriate remedy to enforce the orders of the commission, and it has been decided in the courts of last resort of other States that mandamus is the appropriate remedy to compel compliance by railroad companies with proper commission orders. *State, ex rel. Skeen, v. Transit Co.*, 38 Utah, 242 (112 Pac. 120); *State, ex rel. Railroad Com'rs, v. Railroad Co.*, 60 Fla. 465 (54 South. 394).

It may properly be asked what effect should be given to the original bill filed in the United States district court for the eastern district of Michigan, in equity, by respondent, and the appeal from its judgment now pending, upon the question of the issuance of a mandamus by this court.

"As a general rule, the pendency of another suit involving the same question will prevent the issue of a mandamus unless it will be ineffective, or the other court is without jurisdiction." 26 Cyc. p. 184, and cases there cited.

Applying this rule to the instant case, the pendency of the appeal in the Federal court involving practically the same matter as that adjudicated in this court, unless ineffective, or unless the Federal court is without jurisdiction, would operate so as to prevent the issuance of the writ of mandamus. But if this case is one of the exceptions to the general rule, in that the Federal court is without jurisdiction, then the rule should not apply.

Manifestly the respondent, at the time of the making and entering of the orders in question by the commission, had the unquestioned right to submit its controversy either to the State or Federal court. But, having selected the circuit court for the county of Wayne, in chancery, as its forum, and judgment in that court having been rendered against it, and the said judgment having been affirmed on appeal by this

court, respondent cannot now claim jurisdiction in a court which might have determined the controversy at the time the same arose, when it sought the State court and attempted to invoke the assistance of it. *Detroit & Mackinac R. Co. v. Railroad Commission* (D. C.), 203 Fed. 864.

Chief Justice Fuller, in *Moran v. Sturges*, 154 U. S. 256-269 (14 Sup. Ct. 1019, 1022), said:

"It is a doctrine of law too long established to require a citation of authorities that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction."

Justice Shiras, in *Harkrader v. Wadley*, 172 U. S. 148, at page 164 (19 Sup. Ct. 119), lays down the rule in this language:

"When a State court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted; and this rule applies alike in both civil and criminal cases."

It is contended by respondent that the court first acquiring jurisdiction should proceed to a determination without interference. This may be conceded. Applying that rule, it seems to us that there has been a complete and final adjudication as between the parties to the controversy involving the subject-matter, in a court of competent jurisdiction, to wit, the State court.

We cannot accede to the claim of respondent that the proceedings had in the State court were not judicial in nature. It has already been decided by this court, as well as by the United States district court for the eastern district of Michigan, in equity, that the action of this court in affirming the decree of the Wayne circuit court, in chancery, as well as the action of that court, was not legislative, but was judicial in character.

We do not think the question of comity is here involved, because the Federal court has taken the same view which this court has entertained of the subject-matter. That court not having assumed jurisdiction, and having passed upon this very question of jurisdiction, we see no reason why the writ of mandamus should not issue.

We see no occasion for the forming of an issue upon the questions here presented, and are of opinion that the writ of mandamus should issue as prayed in relator's petition.

It is so ordered.

MCALVAY, C. J., and BROOKE, OSTRANDER, MOORE, and STEERE, JJ., concurred. KUHN and BIRD, JJ., did not sit.

PEOPLE *v.* AYERS.

1. RAPE—STATUTORY OFFENSE—MINORS.

The essential facts necessary to convict a respondent of statutory rape are that he had sexual intercourse with the female mentioned in the information and that she was then under the age of 16 years.

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2. SAME—EVIDENCE—CRIMINAL LAW—SUBSEQUENT OFFENSE.

It was prejudicial error to permit the prosecution to show that the accused committed an offense of the same nature which the information charged, at a subsequent date; having identified a particular transaction shown by the testimony, the prosecution was not entitled to offer proof of a similar act occurring at a later time.

3. SAME—APPEAL AND ERROR—CURING ERROR.

The court did not cure such error by instructing the jury that respondent could not be convicted of the later offense shown by such incompetent testimony, although if, as requested by respondent's counsel, he had charged that the acts, if any, could not be considered for any purpose, the error might have been cured.

4. SAME—VENUE.

In criminal trials the venue must be proved by competent evidence, beyond a reasonable doubt, and judgment cannot be sustained in a cause in which the record contains no proof of the township or county wherein the alleged crime occurred.

5. SAME—EVIDENCE—JUDICIAL NOTICE.

Although the court may take judicial notice of the extent and boundaries of political subdivisions such as counties, townships, cities and villages, the rule cannot be extended to include a farm or other locality designated by the name of its present or former owner.

Error to Cass; Des Voignes, J. Submitted June 12, 1914. (Docket No. 103.) Decided July 25, 1914.

Oliver Ayers was convicted of rape committed upon a female under 16 years of age. Reversed.

Grant Fellows, Attorney General, and *Asa K. Hayden*, Prosecuting Attorney, for the people.

U. S. Eby, *C. M. Lyle*, and *W. J. Barnard*, for respondent.

STEERE, J. Respondent was convicted of the crime of statutory rape in the circuit court of Cass county, under an information containing a single count charging him with having on the 27th day of April, 1911,

in Penn township, Cass county, Mich., feloniously assaulted and carnally known one Mabel Bowerman, a female child under the age of 16 years. After denial of a motion for a new trial, respondent brings the proceedings to this court by a writ of error containing 40 assignments, which, condensed, may be stated as relating to alleged errors in the admission and rejection of testimony, in prejudicial remarks of the court, improper arguments of counsel, in the charge of the court to the jury, in refusal to grant certain of respondent's requests, and in denying his motion for a new trial.

The two essential facts necessary for the prosecution to prove in order to convict were that respondent had sexual intercourse with the girl at or about the time alleged, and that she was then under the age of 16 years. To establish the first, the prosecution relied upon her testimony for conviction. It is claimed, and seems to be conceded by both sides, that she was not of strong mentality and was easily influenced, having made conflicting statements and affidavits upon the subject, at times charging respondent with the offense and at others as positively denying the same. This unfortunately gave rise to considerable acrimony at the trial; each side imputing to the other improper activity in influencing her to make and retract charges against respondent.

On the trial it was shown that said Mabel Bowerman gave birth to an illegitimate child on January 22, 1912. She testified that respondent was the father of this child as the result of sexual intercourse with her which occurred "on the Underwood farm, in the house," where she was a member of his family. She was unable to give any dates. She testified that respondent had intercourse with her more than once previous to that time. The following question was asked by the prosecution:

"Did he have intercourse with you after you knew you were in the family way?"

An objection to this was overruled, and she answered "Yes." This ruling was error. *People v. Davis*, 175 Mich. 594 (141 N. W. 667), and cases there cited. This subject has been so thoroughly canvassed in the cases there referred to that it is unnecessary to here review the principles involved and reason for the rule. The only reason urged in extenuation of this ruling is that in cases of this nature, where the offense is charged as having been committed on or about a certain date, the prosecution is not confined to the exact date alleged but may prove the act as having been committed at any time within the statute of limitations; that owing to inability of the witness, upon whom the prosecution was compelled to rely to give dates, only reasonable latitude was allowed to ascertain and identify the specific act selected and sought to be proven. It is a well-settled rule that the prosecution is entitled to some latitude in the particular mentioned, and should not be compelled in the first instance, before the transaction is clearly identified, to select a particular act or date, but, having once identified and selected a particular transaction, the prosecution must then stand or fall by the election, and proof of subsequent acts of like nature are inadmissible. 22 Cyc. p. 404. If, in the preliminary inquiry, proof of subsequent offenses of like nature is inadvertently or unavoidably made, it should be stricken out and the jury instructed to disregard it.

It is said in this case that the error was cured by the charge of the court in the following language, being a portion of a request preferred by respondent:

"You are further instructed that, if you should believe from the evidence in this case that the respondent had sexual intercourse with Mabel Bowerman after the time she claimed the respondent had intercourse with

her in the bedroom at the Underwood farm, you cannot convict respondent of the same."

Had the court given the remainder of this request, it perhaps would have been sufficient. Said request concluded as follows:

"And such acts of intercourse, if any has been proved, cannot be considered for any purpose."

Respondent was also entitled to have this portion of his request given.

Identifying the alleged offense as that committed in the house on the Underwood farm when she became pregnant, and determining the approximate date by the birth of the child as being on or about April 27, 1911, it is claimed by the prosecution that Mabel Bowerman was shown to have then been under 16 years of age. She testified that she was 17 years old on the 24th of July, 1913. Her mother, Mrs. Jane Thorp, also testified that such was her daughter's age. On cross-examination the mother said that she had borne 10 children, but could not state the exact dates of the births of the others or the dates of her marriage to her first or second husband or of her first husband's death, nor how long she had been married to her second husband. Pursuing this subject she was asked how many years intervened between the births of two of her children, naming them, which inquiry was objected to and the objection sustained. The following question was then asked:

"How do you know that Mabel is 17 years old the 24th of July?"

This question was objected to, and the objection sustained. This was a proper question, directly relating to a most important and material issue in the case. The prosecution contends, in support of this objection and ruling, that the subject had already been gone over, and control of cross-examination is largely

in the discretion of the court. If the cross-examination of this witness was unduly protracted, upon collateral matter or by repetition, the record does not disclose it. No repetition of the question ruled out is anywhere manifest. The preceding cross-examination occupies upon the printed record but little over half a page, and the answers appear to naturally lead up to and make competent in cross-examination the inquiry disallowed.

It is also urged as a ground of reversal that no venue was proven. The rule is elementary that in criminal trials the venue must be proved by competent evidence beyond a reasonable doubt, and where the record fails to locate the place of the crime within the jurisdiction of the court, whether through inadvertence or otherwise, the judgment must be reversed. While in this State, under section 11919, 3 Comp. Laws, an information is not to be held defective for want of proper venue, and time and place need not be proven exactly as alleged, a venue must nevertheless be proven in all cases to show that the court has jurisdiction of the offense charged. *Tiffany's Criminal Law*, p. 535; 22 Enc. of Pl. & Prac. p. 827; 2 Bishop's New Crim. Procedure (2d Ed.), p. 1171; 13 Enc. of Ev. p. 929; *Kolman v. State*, 124 Ga. 63 (52 S. E. 82); *State v. Hartnett*, 75 Mo. 251; *Boykin v. State*, 148 Ala. 608 (42 South. 999). The venue is laid in this information as at the township of Penn, county of Cass, and State of Michigan. We have searched in vain all testimony given upon the trial of this cause, as disclosed by the printed record, for any mention of the township, county, or State, as alleged in the information. The only identification of the time and place, when and where the alleged offense was committed, is found in the prosecutrix's testimony, wherein she states that the intercourse which she had with respondent causing pregnancy, resulting

in birth of the child she bore (which is the act relied on for conviction), took place on the Underwood farm, in the bedroom, in the house.

While courts may take judicial notice of the extent and boundaries of political subdivisions, such as counties, townships, cities, and villages, the rule has never been, and cannot be, extended to cover a farm or other locality only designated and identified by the name of its present or former owner.

Contending that it is possible to draw from the record, taken as a whole, and particularly from the testimony of nearby neighbors as to their residence, an inference that the Underwood farm is in Penn township, the case of *People v. Waller*, 70 Mich. 237 (38 N. W. 261), is cited to sustain this conviction. If any such inference is to be drawn, it locates the Underwood farm in the neighboring county of Calhoun, the only county mentioned by any witness in the record. Although the locality named may have been so well known and familiar to all engaged in the trial that to prove it was in Penn township seemed superfluous, so far as the evidence taken on the trial localizes the Underwood farm in any political subdivision, it might be situated anywhere in the United States, or even in a foreign country. The *Waller Case* deals with political subdivisions, and the court went no further than to hold that judicial cognizance can be taken of the division of a county into townships. In that case the original information charged a larceny to have been committed in the township of Sparta, in Kent county, and the prosecution discovered that the proofs located the offense in the township of Tyrone, in Kent county. A motion was thereupon made for leave to amend the information, which was granted. On the trial the venue was proven to be in Tyrone township, Kent county, Mich. This court said that even an amendment of the information was not necessary, because both townships were

in the same county, and jurisdiction of the circuit court was coextensive with the body of the county. We see nothing in such ruling to sustain an entire omission of any proof as to the township, county, or State in which the act charged was committed.

While many of the remaining assignments of error are deemed unimportant, others would require serious consideration, if they were such as to probably arise upon a retrial of the case, but we assume that they will not and think it would be unprofitable to discuss them here.

For the errors pointed out, the conviction and sentence must be set aside, and a new trial granted.

The judgment is reversed, and a new trial ordered.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

EHLE v. LOOKER.

1. MORTGAGES—DEED GIVEN AS SECURITY—HUSBAND AND WIFE.

A deed given by a married woman to enable her husband to borrow money, conveying the homestead occupied by both, was valid and enforceable, as a mortgage between the parties to the instrument, although the acknowledgment of the wife was irregularly taken by a justice of the peace, who testified that he signed the acknowledgment on the strength of a note, received from the wife, requesting him to acknowledge it as her free act and deed.¹

¹ As to the validity of incumbrance by husband and wife of property held by the entireties to secure the individual debt of the husband, see note in 66 L. R. A. 632.

2. SAME—CONSIDERATION—ESTOPPEL.

As to a grantee who has loaned money to the husband, relying upon the deed, the wife was estopped to deny the validity of the execution and delivery of the conveyance, which she testified that she signed without knowing what the paper was, and, also, that it had been her habit to sign papers which her husband presented to her to sign.

3. SAME—EQUITY—AGENCY.

Where one of two innocent parties must suffer by reason of the acts of a third, the loss must be borne by the one who enables the third person to cause the loss or damage.

4. HUSBAND AND WIFE—ESTATE BY ENTIRETIES—CONSIDERATION.

A wife's conveyance of real property owned by herself and husband by the entirety, to secure or to pay an indebtedness of the husband, is supported by a sufficient consideration and is valid.

5. SAME—DEEDS.

And the instrument was a mortgage as to both defendants, not a deed as to one of them, and mortgage as to the other.

Appeal from Clare; Dodds, J. Submitted June 22, 1914. (Docket No. 54.) Decided July 25, 1914.

Bill by Alfred Ehle against William R. Looker and Lousina Looker to foreclose a deed as a mortgage. From a decree for complainant, defendant Lousina Looker appeals. Affirmed.

John Quinn, for complainant.

G. C. Leibrand, for defendant Lousina Looker.

STONE, J. In this case the bill of complaint was filed to have a certain deed declared to be a mortgage, and to foreclose the same. The defendants are husband and wife, and owned the land in question, 80 acres, as tenants by the entireties. The dealings between the parties leading up to this suit are substantially as follows: In April, 1910, defendant William R. Looker came to complainant and stated that he desired to borrow \$1,800, and to secure such loan would mortgage 120 acres of land, including the land

here involved, and said defendant requested complainant to assist him in obtaining such loan. Complainant agreed to assist said defendant in getting the loan from parties at Gladwin, at which place they were to meet. It developed when they met at Gladwin that said defendant wanted \$2,200 instead of \$1,800, and that he had but 80 acres of land with which to secure the loan, upon which land there was already a mortgage of \$950, and the loan could not be obtained on the security offered. Said defendant then importuned complainant to loan him the money, which complainant declined to do, as he had no money to loan; but later complainant offered to take a deed of the said 80 acres of land from both of said defendants and pay said defendant \$2,800, less the mortgage of \$950, and give back to said defendant a land contract to sell the latter the land in one year at the same price, which was agreed to, and complainant then placed a mortgage on his home farm and obtained the money, and paid said defendant \$1,850, taking a deed from both of said defendants, which deed contained a clause requiring complainant to assume and pay the old \$950 mortgage. At the same time a land contract was entered into between complainant and said defendant William R. Looker, whereby the former agreed to sell said land to said Looker in one year at \$2,800, with interest at 7 per cent. per annum, which contract, as well as the deed, said defendant had prepared and brought with him when the deal was closed.

When the year had expired defendant Looker, not being able to pay complainant anything, the contract was surrendered, and complainant gave to said defendant a written option to purchase the land within one year for \$3,040; that being the amount due complainant under the contract, including interest, insurance, taxes, and interest on the old mortgage paid by complainant. Defendant William R. Looker

did not pay anything when the year was up under the option, and complainant desired his money or possession of the land; defendants having remained in possession of the same all of the time. About this time defendant William R. Looker filed a bill of complaint in the circuit court, in chancery, and obtained an injunction against this complainant, restraining him from interfering with said Looker's possession, and claiming that the deed was a mortgage and praying that it be so declared. Ehle answered, claiming that the deed was an absolute conveyance, but stated that he was willing to accept the amount he had put into the land and deed the same back, but that he desired his money or possession of the land. That case went to a hearing, and the court found that the said deed was a mortgage, and directed payment to Ehle by said Looker of the amounts due the former on or before December 18, 1912, otherwise that the premises should be sold under the usual proceedings, and a decree was entered accordingly. No payment was made by William R. Looker, and the land was sold under the decree to this complainant. After the redemption period had expired the defendant Lousina Looker refused to give up possession of the land; and, inasmuch as she was not a party to said injunction suit, this complainant, recognizing the fact that she had not had "her day in court," filed the bill in the instant case, treating the deed as a mortgage and praying for its foreclosure. The bill was taken as confessed by the defendant William R. Looker. The defendant Lousina Looker filed her answer, denying that she ever signed or executed the said deed or mortgage, or authorized such signing, and stating that she never appeared before the acknowledging officer, or acknowledged the execution of said instrument, as it purported, in the presence of the witnesses whose names appear thereon as such. At the hearing of the instant case defendant Lousina Looker

testified relating to the signing and execution of the instrument, that she could not say as she knew anything about the matter; that she never signed that paper or anything else before Joseph D. Bitler, nor did she sign it in the presence of James W. and Emma Looker; that the signature looked like hers, but she could not give the court any idea how it came to be on that paper; but that she had been in the habit of signing papers which her husband brought home without making inquiry. On cross-examination she testified as follows:

"Q. You have seen this Exhibit A [the deed]? You don't deny that being your signature?

"A. It looks like my signature, but I would not say it was.

"Q. Do you say it isn't? I want you to be sure about it. I want you to say whether it is or not. You know your signature. Tell the court whether it is yours or not.

"A. All I can say, it looks like mine.

"Q. You can say whether it is your signature or whether it is not?

"A. I could not say.

"Q. You could not say?

"A. I signed papers like that.

"Q. Don't you know your own signature when you see it?

"*Defendant's Counsel*: She says it looks like hers, and she doesn't deny it.

"*Court to Defendant's Counsel*: You don't deny it?

"*Defendant's Counsel*: No, she has not denied it."

This deed bore date April 12, 1910, and purported to be signed by both defendants in the presence of James W. Looker and Emma Looker, and to have been acknowledged on April 13, 1910, by both defendants before Joseph D. Bitler, a justice of the peace of Clare county.

Joseph D. Bitler, the justice of the peace, testified that he signed the certificate of acknowledgment, but that Lousina Looker did not personally appear before

him, but sent a written request signed by her as follows:

"Mr. Bitler, please acknowledge this deed signed as my free act and deed."

He testified that the signatures on the letter and deed were the same. James W. Looker testified that he and his wife signed the deeds as witnesses at the request of his brother, William R. Looker, who brought the deed to them. Witness could not testify whether the grantors' names were signed to the deed or not at the time. It perhaps should be stated that the defendant Lousina Looker further testified that the land in question was the home of herself and husband, and had been for 28 years; that she knew very little about her husband's business; that she never received any consideration for the sale or mortgaging of the property; that her husband's transactions were so numerous and varied that she did not undertake to keep track of them; and that when her husband brought in papers for her to sign, she always signed them.

The circuit judge, who heard the evidence and saw the witnesses, found for the complainant. In an opinion filed in the case he said:

"The sole question raised in the case was whether the instrument was signed by defendant Lousina Looker. There can be no doubt but that the complainant is right in his contention, and that the instrument was duly signed by both defendants as the testimony shows. * * * While the acknowledgment of this deed by the defendant Lousina Looker was not regular, the original deed was introduced in evidence, and the controversies being between parties to that deed, and no question arising under the recording laws, acknowledgment by her was not so important as to make any difference with the rights of complainant. The question raised as to the rights of the wife where land is held by entireties was fully answered by the authorities relied upon by complainant's solicitor, especially *People's Building & Loan Ass'n v. Billing*, 104 Mich. 186 (62 N. W. 373)."

A decree in accordance with the prayer of the bill was entered, and the defendant Lousina Looker has appealed.

It is contended by appellant's counsel, in his brief, that the circuit judge erred in his conclusions, and that the real questions are whether:

(1) Mrs. Looker actually executed the deed intelligently, without accident, mistake, or fraud, and without such negligence on her part as might under some circumstances estop her from denying it; (2) whether there was a delivery on her part; (3) whether there was consideration running to her; (4) whether in an estate by the entirety one spouse can convey a fee simple and the other spouse create an incumbrance.

Upon the first and second questions urged by appellant's counsel, we think it should be held that where, as in this case, a wife signs an instrument at the request of her husband, and she testifies that she did so habitually and always, and the husband is thereby enabled to borrow money upon such instrument, the lender relying upon the paper being what it purports to be upon its face, the wife should be held to be estopped from denying the validity of such execution and delivery. *Van Slyke v. Rooks*, 181 Mich. 88 (147 N. W. 579). The maxim that when one of two innocent persons must suffer by the acts of a third, the loss must be borne by the person who enables such third person to occasion it should apply with full force here, even if the facts were as testified to by Mrs. Looker, of which we have grave doubts. The cases cited by appellant's counsel are readily distinguished from the instant case.

Upon the third question, being that of consideration, it is only necessary to say that a wife's conveyance of her property in payment of or security for her husband's debt is supported by a sufficient consideration. *Le May v. Wickert*, 98 Mich. 628 (57 N.

W. 827); *Kieldsen v. Blodgett*, 113 Mich. 655 (72 N. W. 9); *Marx v. Bellel*, 114 Mich. 631 (72 N. W. 620); *Just v. Savings Bank*, 132 Mich. 600 (94 N. W. 200); *Hackley Nat. Bank v. Jeannot*, 143 Mich. 454 (106 N. W. 1121).

As to the fourth question, in the case cited by the learned circuit judge (*People's Building & Loan Ass'n v. Billing, supra*), it was held that a mortgage executed by husband and wife upon land owned by them as tenants in the entirety, to secure a loan made to the husband alone, was valid.

It having been held that the effect of the deed was that of a mortgage, it necessarily was a mortgage as to both defendants, and we see no force in the claim of counsel that it was a deed as to one defendant and a mortgage as to the other.

We find no error in the record, and the decree of the court below is affirmed, with costs to complainant.

MCALVAY, C. J., and BROOKE, KUHN, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

WEAVER v. COLLINS.

LIMITATION OF ACTIONS—STATUTES—DEMAND—ACTIONS—TIME OF ACCRUAL—REDEMPTION—TENDER.

Under a contract of purchase of certain shares of stock to be redeemed at par on 30 days' notice, the right of action for failure to so redeem accrued when a demand in writing was made on the seller to redeem the shares, and was barred by the statute of limitations within six years of the date when the demand was made, not from the date

when plaintiff afterwards formally tendered the stock to the defendant.

Error to Ingham; Wiest, J. Submitted June 16, 1913. (Docket No. 118.) Decided October 2, 1914.

Assumpsit by Emily C. Weaver against George A. Collins for breach of a contract in writing. Judgment for defendant on a verdict directed by the court. Plaintiff brings error. Affirmed.

McArthur & Dunnebacke, for appellant.

C. F. & E. T. Hammond, for appellee.

BIRD, J. On December 7, 1904, plaintiff purchased from defendant 100 shares of the stock of the Lansing Veneered Door Company, paying therefor \$1,000. These shares were evidenced by two certificates of 50 shares each. With this purchase she received the following agreement from the defendant:

"ANN ARBOR, MICH.. 12/7, 1904.

"I herewith agree to redeem on thirty days' notice from Emily C. Weaver, of Ann Arbor, Michigan, the preferred stock owned and held by her in the Lansing Veneered Door Company, of Lansing, Michigan, said stock being certificates number two hundred thirty-two and two hundred thirty-three; said stock to be redeemed at par.

"G. A. COLLINS."

On March 16, 1905, she addressed the following letter to the defendant:

"ANN ARBOR, March 16, 1905.

"MR. G. A. COLLINS.

"*Dear Sir:*

"When I purchased the stock of your company, you gave me a contract by which it was agreed to redeem the certificates on thirty days' notice from me. I accordingly write this to say that I wish the stock redeemed as per agreement at par. Expecting a draft

for the amount, \$1,000, by April 16th, one month from today, I remain,

"Yours truly,

"EMILY C. WEAVER."

Later, and on April 5, 1905, she addressed a second letter to him, reading as follows:

"ANN ARBOR, April 3, 1905.

"MR. G. A. COLLINS.

"*Dear Sir:*

"In accordance with your contract dated December 7, 1904, I hereby notify you to redeem the preferred stock owned and held by me in the Lansing Veneered Door Company, of Lansing, Michigan, by certificates numbered 232 and 233, at the expiration of thirty days from the date hereof.

"Yours truly,

"EMILY C. WEAVER."

Defendant received both letters, but made no reply to either. No further action was taken by the plaintiff until December 5, 1910, when her counsel, armed with a power of attorney from her, tendered the two certificates, properly indorsed, to defendant and demanded the return of the \$1,000. The defendant refused to make good his promise, and this suit followed on May 9, 1911, to recover a judgment for the amount paid for the shares. Defendant pleaded the general issue and gave notice of the defense of the statute of limitations. At the close of the proofs, both parties requested a directed verdict. The trial court was of the opinion that the statute of limitations was a good defense, and therefore directed a verdict for the defendant. The action of the trial court in so doing is assigned as error by the plaintiff in this court.

The assignments of error give rise to but one question: When did plaintiff's cause of action accrue? Defendant contends that 30 days after the letters of March and April, 1905, were written by plaintiff her

cause of action accrued, while the plaintiff insists that it did not accrue till the demand was made and the certificates were tendered, on December 5, 1910, for the reason that not only a demand, but a tender of the certificates, was necessary to create the cause of action. It is obvious that if defendant's contention is sound, plaintiff's claim was barred by the statute. 3 Comp. Laws, § 9728 (5 How. Stat. [2d Ed.] § 14135). The dealings of the parties were such that a cause of action might accrue or might never accrue to the plaintiff. If she were content with her purchase, no cause of action would ever have arisen. The needful thing to create a cause of action in her behalf was, not only an election upon her part to have her money returned to her, but notice to defendant of such election. This she did in the most positive terms in her letters of March and April, 1905. After she gave such notice as her contract called for, it raised some obligation on the part of the defendant, and what was it if not an obligation to pay her the \$1,000, and receive his certificates? But, it is argued that a tender of the shares must accompany the demand in order to make it effective. The contract does not so provide. It calls for notice and is silent as to tender, and therefore we are led to the conclusion that the essential act which gave the right of action sprang from this notice, and that the question of tender was simply one that was incidental to her remedy. Suppose defendant had tendered plaintiff \$1,000 in response to her March and April letters, and she had refused to accept it and deliver the shares, is there any serious doubt that defendant could have recovered them in replevin or their value in trover? And upon the trial of either could she have successfully defended on the ground that she had made no tender of the shares? And could he have recovered in either action if her "cause of action" had never accrued? The answers

to these inquiries are helpful in reaching the conclusion that defendant's contention is the proper one.

We are persuaded that the case falls within that rule which states that:

"Where, although the cause of action itself has accrued, some preliminary step is required before a resort can be had to the remedy, the condition referring merely to the remedy and not to the right, the cause will be barred if not brought within the statutory period; therefore the preliminary step must be taken within that period." 25 Cyc. p. 1199.

See, also, *First Nat. Bank v. Greene*, 64 Iowa, 445 (17 N. W. 86, 20 N. W. 754); *Stillwater, etc., R. Co. v. City of Stillwater*, 66 Minn. 176 (68 N. W. 836); *Baker v. Johnson County*, 33 Iowa, 151; *Schriber v. Town of Richmond*, 73 Wis. 5 (40 N. W. 644).

Appellant seeks to distinguish these cases from the one under consideration, but we think they are in point. The last case cited is a good illustration of the application of the rule. The question involved in that case was whether the statute had run against a certain town order issued in March, 1880. The statute required the order to be presented to the town board for audit before payment. This was not done, but was presented to the treasurer for payment in November, 1886. On the question as to whether the statute commenced to run from the date of issue or demand it was said:

"The question here is, Did the cause of action accrue on the orders in suit when they were issued in 1880 and 1881, or not until payment thereof was actually demanded, November 13, 1886? We think this question is answered by the judgments of this court in *Baxter v. State*, 17 Wis. 588, and *Curran v. Witter*, 68 Wis. 16 (31 N. W. 705 [60 Am. Rep. 827]). In the first of these cases it was argued that, because the statute required a party to present his claim to the legislature before bringing a suit thereon against the State, the cause of action does not accrue, and hence the statute of limitations does not commence

to run until the claim is so presented. This court negatived that proposition, and held that the cause of action accrues when a debt exists which the State owes and ought to pay, without regard to the time when the claim was so presented. Mr. Justice Paine, delivering the opinion of the court, said that this provision of the statute did not constitute 'any element of the cause of action within the scope and object of the statute of limitation. It was a mere condition to the bringing of a suit imposed by law for the protection of the State from unnecessary costs. If a debt existed, it existed entirely independent of such presentation of the claim. It existed as soon as a claim accrued which the State owed and ought to pay. And then it was that the cause of action accrued. True, the party had to present his claim before bringing his suit, but such presentation partook of the nature of the remedy. It was a preliminary proceeding, required of him in order to avail himself of the remedy.'"

The judgment of the trial court is affirmed.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OS-
TRANDER, MOORE, and STEERE, JJ., concurred.

SLOTE v. CONSTANTINE HYDRAULIC CO.

1. WATERS AND WATERCOURSES — DAMS — FLOWAGE — DAMAGES —
EVIDENCE—PLEADING.

Damages to trees of complainant's wood lot were properly awarded by the court, under the averments of an amended bill for an injunction which charged that setting back of water by reason of increasing the height of defendant's dam would cause water to percolate and saturate the land of complainant and would damage him as the dam had not theretofore done, where it was disclosed by the evidence that the trees were actually damaged and killed because of the increased height of the dam.

2. SAME—DAMAGES—INJUNCTION BILL—DAMS.

The fact that in another suit in chancery defendant had been required to lower its dam and that damages in the case instituted subsequently to the commencement of said chancery cause had been awarded on the basis of a permanent increase in the head of defendant's power dam, was a matter to be presented to the court in supplementary proceedings: the equities of the parties could not be adjusted on appeal of the second suit.

Appeal from St. Joseph; Yaple, J. Submitted June 11, 1913. (Docket No. 76.) Decided October 2, 1914.

Bill by William W. Slote against the Constantine Hydraulic Company for an injunction. From a decree awarding damages, defendant appeals. Affirmed.

H. P. Stewart, for complainant.

H. O. Bliss and *R. J. Wade*, for defendant.

BIRD, J. The complainant is the owner of a farm of 173 acres, situate on the west bank of St. Joseph river, about three miles from the village of Constantine. The defendant is the owner of a water power near that village. The defendant had the perpetual right to flood complainant's land to the extent that was necessary to produce an eight-foot head at the dam. In the years 1904 and 1905, defendant raised its dam 30 inches, and complainant claims such raise flooded and rendered useless nearly 13 acres more than were flooded by the eight-foot head. This bill was filed to prevent the completion of the addition to the dam. A temporary injunction was issued, but later was dissolved by reason of a bond being filed by defendant to pay any damages that might be awarded complainant in this suit. After this was done, the addition to the dam was completed. It therefore became a question of fact, under the pleadings, what damages the complainant had sustained by reason of

the raising of the dam. Nearly all of the testimony gathered around the questions: How many acres were flooded in consequence of the addition to the dam, and how much damage was it to complainant's farm?

Both sides produced a large number of witnesses who were familiar with the premises. The complainant's witnesses estimated that the additional flooding covered from 10 to 13 acres, and placed the value thereof at \$100 per acre. The defendant's witnesses estimated that the number of acres were from 4 to 7, and placed the value at from \$75 to \$90 per acre.

Another element of damage was shown in addition to the flooding of the land. It was claimed that, by reason of the raising of the water to a higher level, it had, by percolation through the soil, killed and injured a large number of growing trees on land slightly higher than the land which was flooded. The complainant gave it as his judgment that the destruction of the entire eight acres of timber would lessen the value of the farm \$1,000. After hearing the proofs offered, the chancellor awarded complainant damages in the sum of \$1,300. The testimony as a whole impresses us of the candor and honesty of the witnesses. They simply disagreed in their estimates and judgments, as is not uncommon where such questions of fact are involved. A study of the record, however, has convinced us that, if any one has a right to complain of the amount of the damages arrived at by the chancellor, it is not the defendant.

Damages to the amount of \$1,300 are justifiable, under the proofs, in our judgment, independent of the injury caused to the wood lot, but, complainant not having appealed, no revision of damages in his behalf is permissible.

But it is argued by defendant that no testimony should have been admitted on account of the damages to the wood lot, because the bill of complaint did not

by allegation open the way for its admission. The bill of complaint, as originally filed, was an injunction bill, but later, by reason of the filing of the bond and order of the court, it was transformed into one for damages for the injury caused to the land by the raising of the water. The amended bill charges that, by reason of the addition to the dam, "the water will saturate and percolate through your orator's land as it has never done heretofore, and will damage your orator by reason of raising of said dam to the extent of more than \$1,500." This was sufficient notice to the defendant that the complainant would claim injury to the land through percolation and saturation.

There is another point raised by defendant which demands attention. This case was heard by the same trial judge who heard and decided the case of *Sheffield Car Company* against this defendant; that was a case involving the right of defendant to raise its dam. The testimony in that case was, by stipulation of counsel, received in evidence in this case. Subsequently that case was brought to this court and decided, but not before this case was decided in the trial court. It was held by this court in the *Sheffield Case* that the defendant must lower its dam to the eight-foot head. 171 Mich. 423 (137 N. W. 305, Ann. Cas. 1914B, 984). It is now claimed by defendant in this case that, inasmuch as complainant's damages were awarded on the theory that the dam was to remain at the increased height, it ought not to be compelled to pay such damages.

In his reply brief, complainant answers this by asserting that, since the decree in the *Sheffield Case* was made in this court lowering the dam to the original eight-foot head, the defendant has agreed with the Sheffield Company for a consideration to continue the dam at its present height, and therefore the defendant ought to pay the damages awarded to him.

While this statement is *dehors* the record, it serves the purpose of reminding us how unwise it would be to allow the decision of this case to be affected by equities which have subsequently arisen. If changes have occurred since the decree was made in this case, which have unbalanced or destroyed the equities upon which it was based, it is a matter which can be called to the attention of the trial court in a proper proceeding.

The decree will be affirmed, with costs of both courts to the complainant.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OS-
TRANDER, MOORE, and STEERE, JJ., concurred.

SHOWEN *v.* J. L. OWENS CO.

1. EVIDENCE—HEARSAY—SALES—MACHINERY—BREACH OF WAR-
RANTY—CONTRACTS.

In an action for breach of warranty of a number of thresh-
ing machines furnished by the manufacturer to its sales
agent, it was not erroneous to receive in evidence the testi-
mony of employees and officers of the agent who had ex-
amined several of the machines returned as defective at
the shops of the sales agent, and who testified that the
condition of the machines indicated defects and breakages
as claimed and shown by certain of the purchasers that
had used the threshing machines; the testimony tending
to show similar conditions in other machines manufac-
tured by defendant and returned as defective to the vendee.

2. SAME—PRESUMPTIONS—CAUSE.

Proof that machines manufactured by the defendant and
returned to the sales agent on the ground that they were
defective, had similar breakages and defects as machines
which the purchasers testified, from use and observation,
were so defective, raised a rebuttable inference or pre-

sumption that the common results were produced by a common cause.

3. APPEAL AND ERROR—RECORD—EXHIBITS—INDEX.

Failure to properly index a number of exhibits relied upon by defendant in its assignments of error as erroneously admitted in evidence, the index not stating in brief form the substance of each exhibit, as required by Supreme Court Rule 36, justifies the court in declining to pass on the questions raised by the assignments in a lengthy case involving 126 assignments of error and in which the exhibits were not printed in the record, but produced as part of the bill of exceptions at the argument.

4. EVIDENCE—CUSTOMS—BOOKS—TRADE USAGE.

Evidence offered by the defendant from the books of the agency for the purpose of showing that it was customary in that business to take back machinery and charge it to a certain account, was rightly excluded as immaterial.

5. SAME—LOSS—DEFECTIVE CONDITION.

The testimony relating to the condition of machines returned to the selling agency was competent to show plaintiff's damages and was correctly received in evidence.

6. SAME—EXPENSE OF REPAIRS.

Evidence based on the books of the defendant showing an itemized statement of expenditures for repairing breakages and rebuilding defective machines, corroborated by testimony of officers, employees, and shop men, showing items of expense for repairs and rebuilding of machines was also sufficiently definite and relevant to sustain plaintiff's claim.

7. APPEAL AND ERROR—EXCESSIVE VERDICT—NEW TRIAL.

The proper practice to review an excessive or insufficient verdict is to move to set aside the verdict; the amount of damages will not be considered on appeal unless the point is presented on a motion for a new trial.

Error to Kent; Perkins, J. Submitted April 23, 1913. (Docket No. 35.) Decided October 2, 1914.

Assumpsit by John L. Showen as assignee of the Arbuckle-Ryan Company against J. L. Owens Company for breach of warranty. Judgment for plaintiff. Defendant brings error. Affirmed.

Eastman & Eastman, for appellant.

Clapperton, Owen & Hatten, for appellee.

MCALVAY, C. J. Plaintiff recovered a judgment in an action brought by him in assumpsit, commenced by attachment against defendant to recover damages arising from a breach of guaranty contained in written contracts between his assignor and defendant for the purchase of certain bean threshing machines. Defendant has removed the case to this court for review upon a writ of error.

Certain jurisdictional questions in the case which were raised upon certiorari to this court from an order of the circuit court overruling a plea in abatement and denying a petition to dissolve the attachment were passed upon by this court in *Showen v. J. L. Owens Co.*, 158 Mich. 321 (122 N. W. 640, 133 Am. St. Rep. 376). In that opinion, to which reference is had, the several counts in the declaration are set up at length, wherein plaintiff's cause of action is clearly stated.

The material facts in the case are that plaintiff's assignor, the Arbuckle-Ryan Company, an Ohio corporation, and defendant, a Minnesota corporation, entered into two certain contracts, by the terms of which plaintiff's assignor agreed to purchase from defendant a certain number of bean and pea threshing machines. These contracts were quite similar in terms, and in each defendant guaranteed the machines sold to be free from inherent and mechanical defects. These contracts were in the nature of written orders by plaintiff's assignor for a certain number of these machines at certain prices on certain terms, which orders were agreed to by defendant company in writing. The first was dated May 13, 1904; the second, December 26, 1904.

The following is a copy of the second contract:

"TOLEDO, OHIO, Dec. 26, 1904.

"J. L. OWENS COMPANY,

"Minneapolis, Minn.

"Gentlemen:

"You will please enter our order for thirty Owens bean and pea threshing machines, sizes to be 36x54 inches and smaller. Each machine to be complete with belts, Owen stacker, arranged for straight and side delivery, including tally box.

"The above machine to be sold at a price of 40 per cent. discount from list price of 1904, except re-cleaner with elevator and bagger, which is to be listed at \$150 instead of \$200, and net price of re-cleaners to be \$100 to us.

"All machines to be delivered f. o. b. Minneapolis. The J. L. Owens Company to guarantee the machines to be free from inherent and mechanical defects.

"The Arbuckle-Ryan Co. agree to pay for these machines January 1, 1906, giving the J. L. Owens Company acceptances as machines are shipped with the privilege of the one renewal of such acceptance, or a portion, if desired, interest on such renewals.

"In consideration of the above order, the J. L. Owens Co. agree to give the Arbuckle-Ryan Co. the exclusive sale of the Owens bean and pea threshing machines in the entire State of Michigan. The Owens Co. to furnish necessary printed matter, blank orders, etc.

"Settlement for the above machines to be made August 1st, and if any subsequent orders, settlement to be made on shipment of machinery.

"Any inquiries received by the J. L. Owens Co. from the best territory to be sent us immediately.

"The J. L. Owens Co. agree to keep a stock of repairs when ordered to be consigned to us, and to be subject to a discount of 50 per cent. from the list price.

"Respectfully yours,

"THE ARBUCKLE-RYAN CO.,

"E. J. WEHRLY, Gen. Mgr.

"We hereby agree to the above order.

"J. L. OWENS Co.,

"By J. J. OWENS, Pres."

The Arbuckle-Ryan Company, plaintiff's assignor,

during 1904, under the first contract, which as to the matters in dispute in this case is similar to the second contract, bought from defendant and sold its customers 34 machines. Under the second contract plaintiff's assignor bought 30 machines, of which 20 were sold. Defendant company and its predecessor for several years prior to 1903 had been manufacturing a few bean threshers, and in that year manufactured five machines of a new type, two of which were sent into Michigan. These were experimental machines. In January, 1904, it proceeded to manufacture a shop order of 100 machines, in which the main shaft of the rocker arm system, so called, was changed from the straight eccentric shaft of 1903 to a crank shaft made of cast iron. The machines purchased by plaintiff's assignor in 1904 were out of this shop order. The rocker arm system operating in connection with the crank shaft in this machine was new in a bean threshing machine. These machines were materially wider and longer than the standard makes on the market and were, in several respects as to the construction of the frame and the operation of the separating apparatus, distinctly different from other bean threshing machines. Several pages of appellant's brief are taken up with a detailed description of these machines. As the controversy in this case, under the guaranty of defendant that the machines would be "free from inherent and mechanical defects," is confined to a few features of these machines, it will not be necessary to describe them or to refer to their general construction.

These machines, which were purchased by plaintiff's assignor in the years 1904 and 1905 under these contracts with defendant company, were at once resold to various customers. It is the claim of plaintiff that the first machines delivered under the first contract were inherently and mechanically defective;

that they were improperly constructed and imperfect in materials used and in workmanship; that complaints were made to them by the purchasers on account of breaking of shafts, shaft boxes, and certain other parts. Considerable correspondence was had between the defendant and plaintiff's assignor in relation to these complaints by which defendant was informed of the situation. Defendant's letters show such knowledge, and expressions of regret, together with a promise to send an expert to help rectify the difficulties and fix matters so that there would be no further trouble. The principal complaints made by purchasers which developed in the use of the machines in 1904 were as to the general breaking of crank shafts and shaft boxes, also as to the weakness of the frames of the machines and the poor quality of material from which they were built. There were also complaints that the elevators would not work properly, and that the machines were not strong enough to do the work of threshing beans. These troubles were general and applied to all of the machines sold under both contracts. Plaintiff's assignor was obliged to take back 27 machines sold in 1904 and one-half of those sold in 1905. Twenty-four of those sold in 1904 were shipped to Toledo and almost entirely rebuilt or scrapped by the Arbuckle-Ryan Company.

After this correspondence between the parties, at the close of the season of 1904 and before entering into the second contract, the president of defendant company went to Toledo for the purpose, among other things, of inducing plaintiff's assignor to continue the purchase and sale of machines in 1905. It is claimed by plaintiff that this representative of the company, in furtherance of that purpose, agreed on its behalf to send necessary materials and a competent mechanic to repair and make good every machine already sold.

He also represented that the new machine for 1905 would be built to avoid the weaknesses discovered, and would be a first-class machine; that a different shaft and heavier boxes would be used; also that defendant company would make good every machine sold to plaintiff's assignor in 1904; and that, relying upon such agreements and promises, plaintiff's assignor entered into the second contract. From this representative's testimony it appears that he reported what he had learned of the machines in Michigan in 1904, and it also appears that a representative expert of defendant had been sent into Michigan for the purpose of fixing these matters up, and that defendant had sent repairs and new crank shafts to replace the broken ones in the machines which had been sold to plaintiff's assignor.

Plaintiff claims that the agreement to make good the warranty on these machines in the manner above stated was not carried out. Plaintiff also claims that the machines so purchased by his assignor were paid for, and that by reason of the aforesaid defects in the machines his assignor was obliged to and did expend a large amount of money in rebuilding and repairing such machines as could be repaired, and that he suffered entire loss on other machines, together with loss of profits on sales of machines they were obliged to take back, rebuild, and resell. It is claimed by defendant that there were no inherent or mechanical defects in these machines sold under these contracts; that they were well built of the best material in a good and substantial manner; that the difficulties which arose were caused, not by the defects in the machines, but through the carelessness in operating them by those who purchased the same. Defendant further claims that a settlement was had between the parties at the time of entering into the contract of December 26, 1904, where an allowance was made

to plaintiff's assignor for extras furnished up to that date and an agreement was entered into to furnish additional extras for other machines, which it claims was done and the settlement fully executed, and the claim was made that there was a large balance due it on account of the purchase of such machines unpaid. These claims of defendant are denied by plaintiff.

The record in the case is voluminous, from which it appears that both parties offered testimony tending to support their respective claims in this suit; that the case was submitted to a jury and a substantial verdict returned in favor of plaintiff.

Of the numerous errors assigned by appellant none have been presented and discussed except such as relate to the admission and rejection of evidence and the refusal of the court to give certain requests. These have been as far as possible classified, and are presented and discussed in its brief in 23 groups. The plaintiff and appellee in his brief has considered the errors relied upon by defendant in the same order in which they are presented in appellant's brief.

Before proceeding to consider the errors assigned and relied upon by defendant, it will be helpful in giving a clear understanding of the case to state briefly the theories of the parties upon which they presented it to the court.

The contention of plaintiff was that all these machines purchased by his assignor from defendant were inherently and mechanically defective; that they were purchased and paid for upon the representations and guaranty of defendant with respect to their quality and construction; that the machines so purchased were sold to its customers relying upon such representations that they would be good for the purpose for which they were bought and sold; that from the time the first machine was used for threshing

beans there were continual breakages and difficulties caused by inherent and mechanical defects in them; that every effort was made to repair breakages and other troubles, and great loss and expense accrued; that defendant was notified of the nature of the breakages and the complaints of the purchasers of the machines; and that it participated in the attempts to repair machines and promised to make every machine good, which promise was not fulfilled, all to plaintiff's great damage. Defendant's contention was that these machines were in all respects as guaranteed, and not inherently and mechanically defective; that the breaking of the different parts and the trouble arising in operating the machines were not caused by the weaknesses and imperfections of such machines, but by the carelessness and incompetency of the operators; that plaintiff had failed to show any "inherent or mechanical" defects; that the case had been settled; and that no damages had been shown.

The three most important questions raised upon the errors assigned and relied upon by appellant are:

First, those relating to the competency and sufficiency of testimony admitted by the court in the case, over the objections and exceptions of defendant, upon the question of the inherent and mechanical defects in these machines; *second*, those relating to the competency and sufficiency of the evidence, admitted under the same circumstances, as to the question of loss and damage to plaintiff; *third*, those relating to the refusal of the court to give certain requests presented by defendant.

1. Before discussing these questions it will be proper to state that the machines purchased under the first contract were of the same model, and alike in construction and design. They were machines out of the first shop order of 100 machines defendant ever manufactured of this style of bean threshing ma-

chines. Theretofore it had manufactured only a few experimental machines. In making proof of the claimed inherent and mechanical defects in these machines plaintiff introduced in evidence the testimony of seven individual customers, purchasers of these machines, who each testified fully and at length from his personal knowledge in regard to the actual operation of his machine, as to the weaknesses and defects, both in material and construction, which became apparent as soon as the machine was operated, as to the parts which broke in undertaking to thresh beans, and as to the failure of the machine to perform the work for which it was intended. An examination of the testimony of these individuals shows that the defects were substantially the same in each machine of this class. The most vital and fatal defect which all this testimony of the owners and operators tended to show was the failure of the rocker arm system, which was operated by a main crank shaft connected by four pitmans to the bolter and grain pan, oscillating them in opposite directions for the purpose of separating beans from pods, straw, and dirt. These crank shafts were made of cast iron, and it appears that all of them broke under the strain of the work, as did also the boxes which held the ends of these shafts. This testimony also tended to show structural weakness and poor material in the framework and other parts of these machines.

The machines purchased under the second contract were identical with those under the first, except steel shafts, which were substituted for the cast iron ones, running in different shaft boxes. However, these were exposed to sand and dirt which cut and wore them out rapidly and unevenly, causing the machine to pound and break, by reason of being out of balance.

Plaintiff's bill of particulars claimed damages on

182 Mich.—18.

the ground of defective construction, poor material, and inherent and mechanical defects in 37 machines. Testimony was also offered by plaintiff and admitted of several of the officers and employees of plaintiff's assignor for the purpose of showing the condition of the other machines as to inherent and mechanical defects when the machines were returned to them and were in their shops at Toledo, Ohio. The owners and purchasers of these machines who had refused to keep them and had returned them to plaintiff's assignor were not produced as witnesses. Some of the witnesses had seen some of these machines in operation in the field, but much of this testimony relative to these other machines was given by those who had only seen and examined the machines after their return to the shops, where they were examined and later repaired and rebuilt by plaintiff's assignor. This testimony of all these witnesses agrees as to the condition of the machines and tends to show such condition as to breakages and defects to be the same as in the seven machines concerning which the purchasers testified.

The objection of defendant to the testimony of these witnesses who had not seen these machines in operation to see by what means the broken condition was caused was that it was hearsay and incompetent. It was admitted by defendant that the testimony of the seven original purchasers "was competent and sufficient to warrant the jury in rendering a verdict for damages as far as their respective machines were concerned." It is not denied but that all these machines were identical in construction, with the exception of the shafts and boxes in the machines bought under the second contract. The testimony of the seven owners tended to show the existence of common, inherent, and mechanical defects in the class of machines in question which produced common results. The testimony of the other witnesses, tending to show

like conditions, which was objected to, was in our opinion competent. All of the testimony upon this subject related to a class of machines of the same type and construction. After being used, all of the machines rejected and returned by the purchasers to plaintiff's assignor showed the same conditions as to breakages and defects. It follows that this testimony objected to raised a presumption or inference that such common results were produced by a common cause. Such presumption or inference, however, would be rebuttable. 1 Wigmore on Evidence, §§ 437, 438, and notes. The court was not in error in admitting such testimony.

Two other matters, one relative to the admission of evidence offered on the part of plaintiff, and the other relative to the exclusion of evidence offered by defendant, should also be considered under this subdivision. Thirty-nine assignments of error are included in the objections of defendant to the admission of that number of letters offered and received in evidence. These letters are not printed in the record. They are part of a voluminous correspondence between these parties during their business relations under these contracts relative to the bean threshing machines, and extend over a long period of time, which were introduced by both parties. By a stipulation between the parties defendant was relieved from printing these letters, and they were stipulated to be made a part of the bill of exceptions to be produced on the hearing, etc. From these assignments of error there is no indication where the exceptions upon which they are based may be found in the record. There is a reference in each assignment of error covered by this paragraph of defendant's brief to the number of the exhibit referred to. Reference to the index of exhibits according to such numbers gives merely the pages where the exhibit is supposed to

appear, and a statement that it is a letter from plaintiff to defendant, or vice versa, not giving "in brief form the substance of such exhibit" as provided by Rule No. 36. When the statement is made that the record contains 540 pages, with a large portion of the 126 assignments of error relied upon, and that there are 154 exhibits, 40 of which are included in this group, it will indicate in some measure the amount of work required of the court in order to intelligently understand what these exhibits contain and to pass upon the objections made to their introduction. We, therefore, refuse to consider these assignments of error on account of noncompliance with the requirements of the rules of this court.

During the trial, on cross-examination of Mr. Ryan, one of plaintiff's witnesses, defendant offered the books of plaintiff's assignor, which were then in court, in evidence for the purpose of showing that "It is a customary thing in its business to take back machinery and charge it back to bills receivable." From defendant's brief it appears that it "contended that it is customary among jobbers and manufacturers of agricultural implements to repair and rebuild a large number of machines sold." The court properly excluded the evidence as immaterial to the issue.

2. Errors are assigned by defendant upon the admission of testimony in relation to the loss and damage to plaintiff because of its incompetency and insufficiency.

Our conclusion as to the admission of the testimony relative to the condition of the machines which had been returned to plaintiff's assignor for which plaintiff claimed damages by reason of the failure of defendant's guaranty bears directly upon the question of the amount of such damages, and is against the contention of defendant. It agrees with the conclusion of the learned trial judge, who, in submitting the case

to the jury, properly instructed them upon the matter of the consideration of such testimony in arriving at the amount of plaintiff's damages. It follows that as to that portion of his damages plaintiff would be entitled to recover such as he could establish by competent proof.

Defendant has also assigned errors upon the admission of certain testimony, other than that above referred to, on the part of plaintiff, which was offered to show the loss and damage suffered in repairing and rebuilding the machines which were refused and returned, and other items caused by defendant's breach of guaranty, on the ground that it was uncertain, indefinite, and incompetent. The record shows that soon after plaintiff's assignor purchased these machines under the first contract and began to sell them, complaints as to breakage, etc., already referred to, began to come in and payment for machines was refused and purchasers began to reject and return them; that plaintiff's assignor undertook to repair such machines without success. The record also shows from testimony and the voluminous correspondence between the parties defendant's early knowledge of the breakages in and return of machines, and it also attempted to remedy the difficulties by furnishing supplies to replace broken parts and sending an expert for the purpose of putting the machines in good working condition, but without success. This condition relative to the breaking and return of machines continued during a long period of time. It appears, also, that plaintiff's assignor did not know that the machines were of an experimental character and not as represented; that it had paid for all, or nearly all of them, under the contract, and had sold them relying upon the guaranty, and was under obligation to the purchasers to repair or make good the machines sold, and was not in a position to rescind the

contracts and return the goods. The territory in which these sales were made extended over the entire State of Michigan. Many of the machines returned were repaired and rebuilt and disposed of for what they would bring. Others were scrapped because they were useless. An itemized account of all of the cost and expense in taking up, repairing, and rebuilding all of these machines was not kept. The testimony is voluminous as to the manner in which the machines were handled after they were returned to the shops at Toledo and the attempts made to repair and reconstruct them and the disposition of all of them. Twenty-three machines were rebuilt. Others were disposed of in various ways, and, as already stated, several were scrapped. The witnesses on the part of plaintiff who testified relative to the amount of damages he had suffered were officers and employees of plaintiff's assignor, including the superintendent of the shops, the men who assisted in taking up the machines, and those in charge and control of the books of the corporation. This testimony was given from actual knowledge of the witnesses as to what had been done and expended, and also from the books which were produced. The objection is made that the testimony relative to these damages was too uncertain and indefinite, and should not have been admitted in the case. It is apparent from the record, and was so stated by the court while this question was being considered, that the situation was complicated, yet there was evidence presented and admitted which tended to show from the books kept at the time that an accurate itemized account was kept by plaintiff's assignor, showing the exact amount expended in repairing and rebuilding three of these machines and further testimony given by witnesses who claimed to have personal knowledge of the rebuilding of these machines that the expense to rebuild each machine was practically

the same. There was also evidence both from the books and from oral testimony introduced tending to show other items which had been expended by plaintiff's assignor on account of the claimed inherent and mechanical defects in these machines. From an examination of the record it appears that the court excluded testimony that appeared to be speculative or uncertain, and the testimony admitted was confined to amounts which were shown to be actual and substantially accurate. The testimony which was admitted upon the question of damages was not speculative, uncertain, or indefinite, but was both competent and material.

3. Assignments of error Nos. 117, 118, 119, and 120 are based upon the refusal of the court to give certain requests to charge presented by defendant. With one exception these are the only errors of the great number assigned to the charge of the court and the refusal to give requests to charge, which are not waived by the defendant. These four assignments of error were combined and argued together with assignments based upon exceptions to the admission of the testimony of witness Ryan, touching the condition of the machines when they arrived at Toledo and the manner of rebuilding and repairing them and the general method adopted by plaintiff in arriving at his measure of damages as to the entire 37 machines. We have already discussed the testimony of this witness and other testimony of like character, and determined that the court was not in error in admitting such testimony. While such determination to a large extent disposes of the errors assigned as to the refusal to give these requests to charge, yet it is necessary for the court to state that they included other propositions. The record shows that the portions of such requests which were proper and material were given, substantially as requested, in the main charge of the court.

There are many other assignments of error relating, for the most part, to the admission of testimony which are relied upon by defendant in its brief. These have been carefully examined. One of them shows upon the face of the record that it was without doubt a typographic or stenographic error. Others are without merit and of no importance in the consideration of the case. None of them in our opinion was prejudicial to defendant.

Defendant in its brief argues that the verdict was excessive. No motion to set aside the verdict was made in the case, which is the proper practice to raise that question in this court. The case is an important one, and, from a statement which appears in the record, it occupied the attention of the court and jury for about six weeks. A large amount of testimony was admitted and submitted to the jury. The facts were more than usually complicated. The record shows that the case was tried skillfully, and that the questions of fact involved were submitted to the jury in a charge which carefully instructed them as to the law in the case. In this court we find that counsel for defendant have only questioned this charge in two particulars. The jury has passed upon the facts and rendered a verdict in favor of the plaintiff, which in our opinion was supported by the evidence which was submitted to them. Upon the questions of law presented to this court we have agreed with the learned trial judge. We find no prejudicial error in the case.

The judgment of the circuit court is affirmed, with costs to plaintiff.

BROOKE, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

PATTERSON v. KASPER.

1. INFANTS—RESCISSION OF CONTRACT—FRAUD.

Before reaching majority, for fraud in the inception of the contract, a minor may rescind the purchase of a horse which proved to be vicious.

2. SAME—FRAUD—ASSUMPSIT.

Notwithstanding that defendant was likewise an infant and his tort may have arisen out of a contract that he has fraudulently induced the plaintiff to enter into, an action might be maintained in assumpsit to recover back the price paid for a horse, plaintiff having elected to rescind and return the animal to the vendor.¹

3. SALES—ACTIONS—FRAUD—CONTRACT.

Assumpsit does not, however, lie against a defendant who participated in fraudulent misrepresentations upon the sale of a horse, but who received none of the proceeds of the sale that were paid to the codefendant and by him retained.

Error to Clinton; Searl, J. Submitted October 16, 1913. (Docket No. 53.) Decided October 2, 1914.

Assumpsit by Erford Patterson, by next friend, against Joseph Kasper and another. Judgment for defendants on a directed verdict. Plaintiff brings error. Reversed.

William M. Smith, for appellant.

Lyon & Moinet, for appellees.

BIRD, J. The plaintiff, a minor, claims that he purchased from Joseph Kasper, a minor, and Tyler Georgia, an adult, a horse for \$158, upon the representations of both of them that the horse was sound and all right. The horse turned out to be a vicious kicker, and when the plaintiff discovered this, he re-

¹On the question of the liability of an infant for tort in inducing a contract, see note in 57 L. R. A. 675.

turned the horse to the defendants and demanded the return of his money. The demand being refused, this suit was commenced to recover it. The declaration is in assumpsit, and contains a special count, and also the common counts. At the conclusion of plaintiff's case a verdict was directed for the defendants on the ground that, the plaintiff being a minor, he could not rescind his contract during his minority. Upon a motion for a new trial the court further held that plaintiff's testimony did not make a case against defendant Georgia, and further, that no recovery could be had against the defendant Kasper by reason of his infancy. Therefore three questions are presented in this court:

(1) Can an infant rescind his contract for the purchase of personal property on the ground of fraud during his minority?

(2) Is the infant defendant liable in such action?

(3) Did the testimony make a case against defendant Georgia which should have been submitted to the jury?

1. The question as to whether an infant can rescind his contract during his minority on the ground of fraud was recently determined by this court adversely to the contention of the defendants in the case of *Stoll v. Hawks*, 179 Mich. 571 (146 N. W. 229).

2. The rule is general that infants are liable for their torts in the same manner as adults. 22 Cyc. p. 618. But it is argued by defendants that this is a "matter arising *ex contractu*, and, even though it be infected with fraud, it cannot be changed into a tort in order to charge the infant by a change of remedy." In a case like the present one it is said a safe test to apply is: "Can the infant be held liable without directly or indirectly enforcing his promise?" *Rice v. Boyer*, 108 Ind. 472 (9 N. E. 420, 58 Am. Rep. 53). The plaintiff is not suing on

the contract, nor is he relying thereon as he would have done had he affirmed the contract and brought an action for damages based upon the fraud of the defendants. He has, on the other hand, rescinded the contract, and he is now engaged in an effort to reclaim his money which found its way into defendant Kasper's hands through the false and fraudulent representations of both defendants. Measured by the foregoing test, there would seem to be no sufficient reason why a recovery should be denied on this ground.

Some observations made by the court in the case of *Shaw v. Coffin*, 58 Me. 254 (4 Am. Rep. 290), will be interesting here, in view of the contentions of the defendants. In that case the action was assumpsit based on certain promissory notes which had been given by an infant to cover moneys which he had wrongfully taken. The court said in part:

"Is an infant liable on assumpsit for money stolen, or for the proceeds of stolen property when converted into money? The thief of full age is so liable. The owner of property stolen, and converted into money by the thief, may maintain assumpsit against him for money had and received. *Howe v. Clancey*, 53 Me. 130; *Boston, etc., Railroad Corporation v. Dana*, 1 Gray [Mass.], 83. The reasons upon which these decisions rest apply equally to the minor as to the adult. If the minor is liable for his torts, it is immaterial to him in what form of action recompense is sought. If for the purposes of justice the tort may be waived in the case of the adult, and assumpsit maintained, it can, to accomplish the same great purpose, be equally well waived as to the minor. It would be a reproach to the law, if a minor, when arrived to years of manhood, were to be allowed to escape from the payment of what is due, by the plea that he had stolen the money demanded of him when under age. In *Walker v. Davis*, 1 Gray [Mass.], 506, Thomas, J., says:

"The defendant obtained the possession of her (the cow) by fraud, a fraud to which infancy would constitute no defense.

Supposing no contract to have been made, the plaintiff then had the election to bring his action for the tort, or, as the cow had been sold before the note became due, to waive the tort and bring assumpsit.'

"In *Towne v. Wiley*, 23 Vt. 359 [56 Am. Dec. 85], referring to the liability of infants for torts, Redfield, J., in delivering the opinion of the court, says:

"In all the cases, then, upon this subject, it will be found that the courts profess to hold infants liable for positive, substantial torts, but not for violations of contracts merely, although by construction the party claiming redress may be allowed, by the general rules of pleading, to declare in tort or contract at his election.'

"The precise question here presented arose in *Elwell v. Martin*, 32 Vt. 217, and the court there held that the defendant was liable in assumpsit for money tortiously taken by him during his infancy."

3. We think the trial court was right in holding that no case was made by the plaintiff against the defendant Georgia. The record shows, as plaintiff contends, that Georgia made representations respecting the horse which it is claimed were false, but it does not show that Georgia was the owner of the horse, nor that he received any of the purchase price. If this were an action of fraud, the question as to whether he was the owner of the horse or had received any of the purchase price would be of no importance if he made false and fraudulent statements which induced plaintiff to part with his money, but this is an action of assumpsit wherein plaintiff is seeking to recover his own money which it is agreed was paid to defendant Kasper.

For the errors pointed out, the judgment of the trial court will be reversed, and a new trial ordered.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OS-
TRANDER, MOORE, and STEERE, JJ., concurred.

WILLIAMS v. HAMMOND.

MORTGAGES—FORECLOSURE—PAYMENT—DISCHARGE.

Upon an appeal from a decree discharging a mortgage on complainant's farm, as paid, and on review of the evidence and issues of fact, the decree of the trial court is affirmed as warranted by the evidence.

Appeal from Cass; Des Voignes, J. Submitted November 5, 1913. (Docket No. 77.) Decided October 2, 1914.

Bill by Isaac N. Williams against M. Grace Hammond and another to cancel a mortgage as satisfied and paid. From a decree for complainant, defendant Hammond appeals. Affirmed.

W. C. Jones and Carr & Eby, for complainant.

David Anderson, for defendant Hammond.

BIRD, J. The thing sought to be accomplished by the filing of the bill of complaint in this cause is the cancellation and discharge from record of a real estate mortgage for \$1,600, which complainant gave on his farm in the year 1875. His claim is that the mortgage has been paid. The defendant denies that it has been paid, and claims that there is still due upon it upwards of \$5,000, and by way of affirmative relief prays for a decree of foreclosure. The sole issue is whether anything is yet due on the mortgage. The chancellor before whom the hearing was had found in favor of the complainant, and a decree was made discharging the mortgage from record. Defendant M. Grace Hammond appeals from this decree.

The mortgage was given in January, 1875, by complainant, and bore interest at the rate of 10 per cent. His claim is that he made payments thereon from

time to time as the years passed, sometimes getting a receipt, and at other times getting no receipt, relying upon the promise of the mortgagee to indorse the same on the mortgage. He claims that these payments continued to be made until April, 1897, when he let the mortgagee have a horse, cow, and a harness, with the understanding that it was to be in full settlement of the balance due on the mortgage. The complainant had no memoranda of payments which he claimed to have made. This was explained by the fact that he could neither read nor write. The original mortgagee was one Murdock, who assigned the mortgage in March, 1888, to L. R. Anderson, who in turn assigned it to the defendant, his daughter, in March, 1904. Applying the payments indorsed on the notes, the defendant claims there is still due thereon the sum of \$5,750.50. If we take into consideration only the payments which are indorsed on the notes, the defendant is undoubtedly entitled to the decree which she claims. We think, however, after a careful examination of the record, that we should not disregard all the other evidence in the case which shows that other payments were made to Mr. Anderson and never indorsed.

The complainant testified that he made other payments for which he held no receipts, reciting, in some instances, the circumstances under which they were made, and in others where they were made, and that the balance was settled by turning over the horse, cow, and harness. His testimony was corroborated by his wife and other members of his family, and by other witnesses who apparently had little, if any, interest in the controversy. This testimony we shall not discuss in detail. If this testimony by itself is not strong enough to discharge the burden of proof which rests upon the complainant, when considered in connection with certain conduct of Anderson and

his daughter, we think the chancellor might well conclude as he did that complainant's case was established. To some of these things we shall refer briefly. Mr. Anderson owned the mortgage from 1888 to 1904, and called upon the complainant frequently for money. These demands continued down to the time when complainants say that Anderson received the horse, cow, and harness in payment of his claim. This is conceded to be the last payment made. During the next seven years, Anderson was in that vicinity a part of the time and a part of the time he was in the West, but on two or three occasions while living in the West he returned and visited his former home. If defendant's theory is true that there is now \$5,750 due on the mortgage, there must have been upwards of \$3,000 due before Mr. Anderson went West. The record shows that he was a good business man, and thrifty, and it is somewhat difficult to understand why he should have permitted a mortgage, with \$3,000 and upwards due upon it, to drift along for seven years and better without taking any steps to enforce its collection, especially when that sum was very nearly the value of the farm. We think this has a strong tendency to corroborate the testimony of complainant that the balance due on the mortgage was settled in April, 1897, when the horse, cow, and harness were turned over to the mortgagee.

Another argument which is made by complainant's counsel which has some force is the fact that defendant had already collected upwards of \$7,000 on the other mortgages which were included in the assignment with the one in question, in which assignment the entire consideration named was only \$4,000. The force of this argument is somewhat weakened, however, by defendant's testimony that she did not purchase them; that the assignment was made for the purpose of enabling her to collect and discharge them.

Upon the hearing the mortgage was not produced, and the daughter could not find it among her father's papers. Her father, the assignor, died in 1909. She produced the notes with their indorsements. She testified she did not know how much was due upon the mortgage, and by her conduct and testimony she clearly evinced a doubt as to whether the payments were all indorsed upon the notes. After the assignment was made, the supervisor testified she stated to him that there was only "about \$300" due on the mortgage. She also visited complainant and requested to see his receipts and took memoranda of them, and when pressed for a reason, upon cross-examination, why she wanted to see the receipts, she said:

"I saw the notes before the assignment was made. I did not figure up the amount due because one never could tell what had been paid, what they had receipts for, that is, receipts that had not been indorsed."

These statements upon her part give rise to the belief that she herself thought there might have been payments made and not indorsed by her father. Some other questions are presented by the record, but in view of our conclusion that the testimony fairly shows that the mortgage has been paid, it will be unnecessary to discuss them.

The decree is affirmed, with costs of this court to complainant.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, MOORE, and STEERE, JJ., concurred.

CONROY v. HAFFNER.

1. EVIDENCE—BOOKS OF ACCOUNT—BANKS.

The books of a private bank showing the ownership of a note, which plaintiff claimed was not owned by the bank but by the payee, who had placed it in the bank for collection, were inadmissible in behalf of the defendant to sustain his contention that the bank had title to the note; defendant being part owner of the bank and having made the entry as cashier. It might not be admitted as a memorandum made by a third party, but was objectionable as hearsay.

2. SAME—BEST EVIDENCE—CORRESPONDENCE.

Although it might be competent to show, on cross-examination of the plaintiff, that he had written or had failed to write to defendant relative to a certain matter, the question was incompetent if it called for the contents of the letter.

3. BILLS AND NOTES—REQUESTS—PAYMENT.

Where the plaintiff claimed that the payee of a note executed by plaintiff and held by defendant owed him a stated sum on a separate account and plaintiff desired to pay the note, except that amount, which he deposited with the defendant to protect the indorser on the paper, the charge of the court that if no such arrangement was made and the money paid to satisfy the debt, plaintiff could not recover, sufficiently presented the issues to the jury; there was no error in refusing to charge that if the bank purchased the note in due course, plaintiff could not recover.

Error to Shiawassee; Miner, J. Submitted November 18, 1913. (Docket No. 141.) Decided October 2, 1914.

Assumpsit in justice's court by Thomas Conroy against George Haffner for money had and received. From a judgment for defendant, plaintiff appealed to the circuit court. Judgment for plaintiff. Defendant brings error. Affirmed.

182 Mich.—19.

Peter B. Lennon (*Byron P. Hicks*, of counsel), for appellant.

Willis L. Lyons, for appellee.

BIRD, J. This case originated in justice's court, and involves a claim of \$84. The defendant prevailed in justice's court, but in the circuit court plaintiff was given a judgment for his claim. The circumstances out of which the controversy arose are as follows: Plaintiff Conroy purchased a stallion for \$517.50 at his neighbor Hawley's auction sale, and gave his note therefor, due in one year. Plaintiff claims that, when he executed the note, Hawley agreed to leave it at the Corunna or Lennon Bank, and at its maturity he could have a renewal, if he desired. A few days before it was due, the Lennon Bank notified him of the date of maturity. Later he tendered payment, part in cash and the balance in a promissory note, but the note was refused on the ground that Mr. Hawley would not accept it. Defendant Haffner at this time advised plaintiff that Hawley still owned his note, and that he had it for collection. Subsequently plaintiff went to the bank with funds sufficient to pay the note, but explained to defendant that Hawley was indebted to him in the sum of \$84, and he wanted to apply the account on the note, but he wanted to avoid making his indorser any trouble. At the suggestion of defendant, the \$84 was left with him personally, to be applied on the note, when Hawley's consent should be obtained. The application was never made nor the money returned to plaintiff. The defendant denied that the \$84 was left with him personally, and denied that Hawley was the owner of the note, but that the bank bought it soon after it was given, and when due plaintiff paid it. The assignments of error relate to the rejection of evidence and to the charge of the court.

1. The discount register of the bank was offered

in evidence to corroborate the defendant that the bank, and not Hawley, was the owner of the note. Objection was made thereto, and sustained. This is assigned as error. The defendant argues that this testimony was material as bearing upon the ownership of the note. His argument is based upon the theory that the entry was "memoranda made by a third party." We think counsel is in error in assuming that it was memoranda made by *third* parties. The bank was a private one, and defendant was a part owner thereof. He was also cashier. The entry in the bank register was made by himself. In view of these facts, the entry should not be considered as one made by a third party. The rule governing the admission of memoranda made by one of the parties to the litigation should be applied here. Such memoranda is regarded as self-serving and inadmissible. *Weaver v. Bromley*, 65 Mich. 212 (31 N. W. 839); *Caldwell v. Bowen*, 80 Mich. 382 (45 N. W. 185); *Hodges v. Power Co.*, 109 Mich. 547 (67 N. W. 564); *Collins v. Shaw*, 124 Mich. 474 (83 N. W. 146); *Stabler v. Clark*, 155 Mich. 26 (118 N. W. 605).

2. Plaintiff was asked upon cross-examination:

"Did you ever write to Mr. Haffner here, or have your attorney write to him and ask him about Mr. Hawley's property, whether there was anything around that you could get hold of or not to get this \$84?"

The question was objected to because immaterial. The court, however, appears to have excluded it on the ground that it asked for the contents of a writing. The question was objectionable on the latter ground, because it not only inquired as to the fact of his having written a letter concerning the matter, but also asked for the contents of it.

3. The trial court was requested to charge that:

"If the jury finds that Hawley sold the note to the bank in the ordinary course of business, then Conroy

was obliged to pay the amount of the note, \$517.50, to the bank, and cannot recover anything in this case."

The charge of the court fairly shows, we think, that this request was covered. After reciting to them the claims of the plaintiff, he instructed them that:

"But if at that time there was no such agreement, and no such understanding, and that the money was given to the defendant for the purpose of paying this note, and the note was delivered to him at that time, then, in that case, the plaintiff could not recover."

In connection with this assignment, defendant complains that his theory of the case was not given to the jury by the court. We are of the opinion that the court fairly stated the claims of the parties to the jury, and gave the law applicable thereto. We have examined the other errors assigned and find no reversible error in them.

The judgment of the trial court is affirmed.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, MOORE, and STEERE, JJ., concurred.

BALCH v. RADFORD.

1. LANDLORD AND TENANT—ESTOPPEL—TAX TITLE—SUMMARY PROCEEDINGS—CIRCUIT COURT COMMISSIONER.

The tenant being estopped to dispute his landlord's title, unless a change has occurred in interest subsequent to the making of the lease, in summary proceedings for the possession of a house and premises occupied by the defendant, such tenant was estopped to set up a change of

title, arising from a tax sale of the leased property, by virtue of which title had vested in the purchaser at the time the premises were rented.

2. SAME — FORCIBLE ENTRY AND DETAINER — JURISDICTION OF CIRCUIT COURT COMMISSIONER.

It is not a defense which ousts the circuit court commissioner of jurisdiction of summary proceedings for the possession of real property, that prior to the making of a lease, the title of the landlord has been divested by sale of the property for city taxes.

OSTRANDER and BIRD, JJ., dissenting.

Error to Wayne; Van Zile, J. Submitted November 14, 1913. (Docket No. 126.) Decided October 2, 1914. Rehearing denied December 19, 1914.

Summary proceedings by Mary E. Balch and others against George W. Radford for possession of premises occupied by respondent. Judgment for complainant in both commissioner's court and circuit court. Affirmed.

Thomas A. E. Weadock, for appellant.

Gray & Gray (Harrison Geer, of counsel), for appellees.

BIRD, J. (*dissenting*). These proceedings had their beginning before a circuit court commissioner to oust the defendant from the possession of certain premises in the city of Detroit. Judgment of ouster was entered by the commissioner, and a like result was reached in the circuit court. The appellant insists in this court, as he did before the commissioner and in the circuit court, that the commissioner had no jurisdiction to try the case because the issue involved a question of title to real estate.

It appears that defendant and his wife mortgaged their homestead, known as 74 Hancock Avenue East, in 1895, to one George W. Balch. Failing to make payment in accordance with the terms of the mortgage, a foreclosure and sale followed, and the prem-

ises were purchased by the mortgagee. The equity of redemption expired on September 10, 1910. The defendant then leased the premises for seven months from the purchaser. This lease expired on April 10, 1911. The possession of the premises was then demanded by the complainant, and defendant refused to yield it, claiming that the relation of landlord and tenant no longer existed between them; that he was a tenant of another who had acquired a deed for 99 years of the premises through certain tax sales made by the city of Detroit for delinquent city taxes for the years 1906-07. See charter of Detroit 1904, chapter X.

It further appeared that the possession of the premises was demanded of defendant by Laing, the owner of the tax deeds, both before and after the lease expired, and that the latter demand was accompanied by an exhibition of his tax deeds. Defendant advised complainant of these demands. To the latter demand, which was that defendant should either accept a lease from him or surrender possession, the defendant accepted the lease, and has ever since recognized Laing as his landlord. It is said that when these facts appeared, and defendant offered to show paramount title in Laing, the commissioner was sufficiently advised that the title to real estate was involved, and therefore it was his duty to dismiss the case for want of jurisdiction. On the other hand, it is contended that to permit this defense to prevail would be to set at naught the well-known maxim that "a tenant may not dispute the title of his landlord." Defendant admits that he was a tenant of complainant, and he recognizes the rule that he could not, while holding possession under complainant, contest his title, unless some change had taken place in the title subsequent to the leasing, but he insists that after the lease expired he was constructively evicted by one who had a paramount title, and, after being so

evicted, he attorned to the owner of that title. Complainant replies that if there were any defect in the title, it existed at the time of the leasing, and for such defect defendant could not contest it either before or after the lease expired. And it is said that inasmuch as Laing received his tax deeds prior to the leasing, namely in 1907 and 1908, no change in the title had taken place; that complainant had the same title when he was before the commissioner that he had when the lease was made.

The basis of the estoppel which prevents a tenant from contesting his landlord's title is the fact of possession. After the tenant has been actually or constructively evicted, or has surrendered the premises, the possession is at an end and he is at liberty to try titles with his landlord. *Nims v. Sherman*, 43 Mich. 45 (4 N. W. 434); *McGuffie v. Carter*, 42 Mich. 497 (4 N. W. 211); *Jenkinson v. Winans*, 109 Mich. 524 (67 N. W. 549). But, it is argued by complainant that defendant can contest the title only when some change occurs therein after the date of the leasing; that he may not contest the state of the title at the time of the leasing. This would be true if he undertook to contest the title while the relation of landlord and tenant continued to exist, or, in other words, while he was holding possession under the landlord, but it would not be true if the tenant had surrendered or been evicted, because after that he is out of possession or is holding under another, and he may then contest any title under which the complainant claims, whether the same was acquired before or after the leasing. 24 Cyc. p. 948; *Smart v. Smith*, 13 N. C. 258.

The disagreement of counsel over the law arises largely because complainant argues the case on the assumption that the defendant was still holding possession of him when this proceeding was commenced,

while the defendant argues it on the theory that he was holding possession under another. We think the case is ruled by *Jenkinson v. Winans*, *supra*, and that the proffered proofs of defendant put the title in issue, which issue the commissioner had no power to try. *Bennett v. Robinson*, 27 Mich. 26; *Foss v. Van Driele*, 47 Mich. 201 (10 N. W. 199); *Riggs v. Sterling*, 51 Mich. 157 (16 N. W. 320); *Mulder v. Corlett*, 54 Mich. 80 (19 N. W. 756); *Butler v. Bertrand*, 97 Mich. 59 (56 N. W. 342); *Jenkinson v. Winans*, 109 Mich. 524 (67 N. W. 549); *Northern Michigan Building, etc., Ass'n v. Fors*, 171 Mich. 331 (137 N. W. 154).

The commissioner having no jurisdiction to try the issue, it would follow that the circuit court on appeal had none. *Mulder v. Corlett*, *supra*.

The judgment of the circuit court should be reversed and the proceedings before the commissioner quashed, with costs of all courts to defendant.

OSTRANDER, J., concurred with BIRD, J.

BROOKE, J. I am unable to agree with the conclusion reached by my Brother BIRD in this case. He regards the case of *Jenkinson v. Winans*, 109 Mich. 524 (67 N. W. 549), as controlling, while I am of opinion that the facts in that case so differ from the facts in the case at bar as to render it valueless as a precedent for the result reached by my Brother. Indeed, I regard the case as distinct authority for a contrary result. In the case at bar Laing's title matured on September 16, 1910, as evidenced by his tax deeds. On September 28, 1910, Balch's title became absolute under foreclosure proceedings. The title being in this condition, the defendant on October 27, 1910, entered into a lease for six months with Balch. Thereafter no change occurred either in the title of Laing or Balch. In *Jenkinson v. Winans*, *supra*, it is apparent from a careful examination of

the opinion that O'Neill, to whom Winans attempted to attorn, acquired his title *after* the inception of the relationship of landlord and tenant between Winans and Jenkinson. This court said:

"Though the tenant cannot show that the lessor had no title to the premises when the tenancy commenced, he may show that the lands have been sold at tax sales, and the landlord's title thereby extinguished. The estoppel extends only to the title which the landlord had at the time of leasing. If that title has been extinguished, it may be shown; for then the landlord has no right to the possession."

In the case at bar the defendant is attempting to set up the title Laing had acquired before he entered into his lease with Balch. In other words, he seeks to show that Balch had no title at that time. This is distinctly forbidden by all the authorities. I am of opinion that the question of title was not raised by the evidence in the case, and that the commissioner had jurisdiction to proceed to judgment. *Byrne v. Beeson*, 1 Doug. (Mich.) 179; *Stevens v. Hulin*, 53 Mich. 93 (18 N. W. 569); *Butler v. Bertrand*, 97 Mich. 59 (56 N. W. 342); *Gage v. Sanborn*, 106 Mich. 269 (64 N. W. 32).

The judgment is affirmed.

MCALVAY, C. J., and KUHN, STONE, and STEERE, JJ., concurred with BROOKE, J. MOORE, J., did not sit.

ANDREJWSKI v. WOLVERINE COAL CO.**1. MASTER AND SERVANT — WORKMEN'S COMPENSATION — DEATH — CONSTRUCTION OF STATUTE.**

Act No. 10, Extra Session 1912, providing compensation for injuries to employees, or for their death in the course of their employment (2 How. Stat. [2d Ed.] § 3939 *et seq.*), is in derogation of the common law and should be strictly construed, although it is a remedial statute and creates a right against one who would not otherwise be liable.

2. SAME—AMOUNT OF COMPENSATION.

Where a servant has worked in his employment for practically the whole year preceding his injury, his average annual earnings are known or ascertainable and the average weekly wages are to be determined by finding one fifty-second of the annual earnings.

3. SAME—TERM OF EMPLOYMENT.

If the workman has not been employed during substantially the entire year, but his daily wage or salary is fixed, or known, his average earnings as a basis of compensation will be 300 times the daily wage or salary. In case his employment has been limited in term, or there is insufficient data from which to determine his annual earnings, they are to be determined by taking 300 times his daily wage or salary, or the daily wage of similar workmen in like employment.

4. SAME—IRREGULAR EMPLOYMENT.

Decedent worked in a coal mine in the Saginaw valley. The employment was not continuous, but operations were carried on for an average of 211 days in a year. Payment was fixed by contract on the basis of the number of tons produced, and the amount that each miner received depended on the coal which was sent up on his number. During the year which preceded the death of deceased, the mine in which he was employed was operated 148 days, and he received \$507.45. While the mine was not in operation, he worked as a cement block layer for another employer, earning nearly the same amount of wages. *Held*, that the first three classes mentioned under section 11 of the compensation act were intended to include workmen

who were employed during substantially the whole year prior to the accident, and that it would not be reasonable or fair to apply such methods of compensation to the case of deceased, and that the average annual earnings should be computed on the basis of the average for the preceding eight years, as provided by the fourth classification under this section of the law.

Certiorari to the industrial accident board. Submitted November 5, 1913. (Docket No. 40.) Decided October 2, 1914. Rehearing denied January 29, 1915.

Anna Andrejwski presented her claim for compensation for the death of her husband, Joseph Andrejwski, against the Wolverine Coal Company. From the order entered awarding compensation, contestant brings certiorari. Reduced and judgment entered.

George M. Humphrey (Humphrey, Grant & Humphrey, of counsel), for appellant.

Coumans & Gaffney, for appellee.

MCALVAY, C. J. This case is brought to this court by the appellant upon a writ of certiorari to review the decision and order of the industrial accident board in affirming an award theretofore made in said cause by the arbitration committee therein. There appears to be but little dispute upon the material facts in the case.

Joseph Andrejwski, deceased, was claimant's husband, employed by appellant in its mine No. 2. On November 18, 1912, in the course of his employment, he came to his death by an accident, which occurred without fault of either party. At this time both the employer and employed had voluntarily made their election to come under and be governed by the employers' liability and workmen's compensation act, being Act No. 10 of the Public Acts of Michigan, Extra Session 1912. (2 How. Stat. [2d Ed.] § 8939 *et seq.*) Claimant is the sole dependent of deceased

entitled to such compensation as may be granted under said act. Deceased had worked as a miner continuously in this mine for ten years before this accident, during all of the time the mine was being worked. This is a coal mine operated by appellant, and is located near Bay City in the Saginaw valley district. This is the principal coal mining district in this State, and includes the operation, under similar conditions, of a number of companies and mines. The mine in question and the other mines in this district do not run continuously during the entire year; some entirely suspend operations for several months during the summer, and others do not operate during a portion of each month, in a measure caused by the fact that operations are controlled by the sales of the product, which depend entirely upon orders. Operations also depend upon weather conditions.

The record shows that no mine in the district runs or has ever run 300 days in the year. It also appears from the operations of these mines for the years 1909 to 1912, inclusive, that the coal mining industry in this district has been carried on on the average for only 211 days in each year.

The miners are paid on contract by the ton and work on numbers. The amount paid depends on the amount each miner sends up on his number. Two or three miners may work together and send up the coal on the number of one of them. The price paid miners is regulated by what is called a "scale" made between the operators and the union, and one of the things always taken into consideration in fixing the wages of miners in this district is that the mine does not run steadily and the miner can only work when it does run.

For the year immediately preceding deceased's death, mine No. 2, in question, was operated 148 days. On his number coal was sent up 131 days, for which

he received a total of \$507.45. During the time when the mine was idle in this year, deceased was working outside of this employment for another employer as a cement block layer and earned \$487.14.

It is conceded that compensation is due and payable to the appellee as sole dependent of deceased, and it is also conceded that such compensation is to be paid weekly for the period of 300 weeks.

The sole question presented for determination is the amount of the weekly compensation to be paid. The case, therefore, involves the construction of section 11 of part 2 of Act No. 10, heretofore mentioned, which deals exclusively with the matter of "compensation." This section reads as follows:

"SEC. 11. The term 'average weekly wages' as used in this act is defined to be one fifty-second part of the average annual earnings of the employee. If the injured employee has not worked in the employment in which he was working at the time of the accident, whether for the employer or not, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary which he has earned in such employment during the days when so employed. If the injured employee has not worked in such employment during substantially the whole of such immediately preceding year, his average annual earnings shall consist of three hundred times the average daily wage or salary which an employee of the same class working substantially the whole of such immediately preceding year in the same or a similar employment in the same or a neighboring place, shall have earned in such employment during the days when so employed. In cases where the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such annual earnings shall be taken at such sum as, having regard to the previous earnings of the injured employee, and of other employees of the same or most similar class, working in the same or most similar employment, in the same or neighboring locality, shall reasonably represent the

annual earning capacity of the injured employee at the time of the accident in the employment in which he was working at such time."

The construction of this section of the statute is for the first time before this court, and our statute, although similar in many respects to other statutes of like import in England and some of the United States, differs quite materially from all of them as to the rules provided for determining the amount of compensation to be paid those entitled thereto under it.

It will therefore be proper to give consideration at the outset to the conditions giving rise to the necessity for such legislation, and also the objects sought to be accomplished and the radical changes brought about by its enactment. Such legislation has undoubtedly been brought about by present industrial conditions which have for years continued to take increased toll from the numbers of those employed, on account of the increased hazards connected with manufacturing, transportation, and kindred industries.

Heretofore if an employee has been injured or killed in any employment in which he was engaged, he, or those representing him or dependent upon him, could recover for such injury or death only when the same could be attributed to the negligence of the employer. Experience has shown that such conditions were unsatisfactory, and results arising from such litigation often worked great injustice to one or both parties. From these conditions has been evolved legislation of this character upon the theory that the industry which occasioned such injuries should, as a part of the cost of production, bear the burden by compensation for the same.

The act in question, like all similar acts, provides for compensation, and not for damages, and in its consideration and construction all of the rules of law and procedure, which apply to recover damages for

negligently causing injury or death, are in these cases no longer applicable, and there is substituted a new code of procedure fixed and determined by the act in question. This legislation, then, is a new departure and creates a new liability, resting upon one class in favor of another, without reference to any negligent conduct of the class upon which the burden is cast. In other words, this legislation is wholly in derogation of the common law. It is legislation which awards compensation for the accidental industrial injuries to be added to the cost of production.

This statute, being in derogation of the common law, should be strictly construed, and that fundamental principle must be applied, although it is remedial and provides a remedy against a person who otherwise would not be liable. This act is entitled:

“An act to promote the welfare of the people of this State, relating to the liability of employers for injuries or death sustained by their employees, providing compensation for the accidental injury to or death of employees and methods for the payment of the same, establishing an industrial accident board, defining its powers, etc.”

This entitling would indicate that this legislation was justified on the ground that it is a proper exercise of the police power of the State. In its construction we enter a new field, to consider only the question of compensation, and to turn absolutely away from the idea of damages.

The compensation provided for is based upon average weekly wages of the injured or deceased party, 50 per cent. of which is to be paid weekly to him or his dependents, for various periods of time, according to the nature of the injury or the length of the disability. The average weekly wages of the employee must always be determined by dividing his average annual earnings by 52.

By section 11 of part 2 of this act the legislature

specifically provided the manner in which the average annual earnings of each employee should be determined by making four classifications, under one of which every case to be considered and determined under this statute must fall. Attention will now be given to these classifications, quoting and construing them in the order in which they appear in this section:

First. "The term 'average weekly wages' as used in this act is defined to be one fifty-second part of the average annual earnings of the employee."

While this sentence is in fact a definition, it is also a classification. There is practically no disagreement between the attorneys for the parties upon this matter. It is admitted that, where an employee has worked in the employment in which he was injured for practically the whole year immediately preceding his injury, his average annual earnings are fixed and known, and to determine by this definition his average weekly wages requires but a simple mathematical computation. That this was the legislative intent clearly appears from the initial clauses of the second and third classifications which immediately follow, both of which treat cases where the injured employee has not so worked.

Second. "If the injured employee has not worked in the employment in which he was working at the time of the accident, whether for the employer or not, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary which he has earned in such employment during the days when so employed."

This class is intended to include those cases where an employee who has not worked in the employment in which he was engaged at the time of his injury, whether for the same employer or not, during substantially the whole of the year immediately preceding his injury, where his daily wage or salary earned

is fixed and known. In such case his average annual earnings will be 300 times such average daily wage or salary earned in such employment during the days when so employed.

Third. "If the injured employee has not worked in such employment during substantially the whole of such immediately preceding year, his average annual earnings shall consist of three hundred times the average daily wage or salary which an employee of the same class working substantially the whole of such immediately preceding year in the same or a similar employment in the same or a neighboring place, shall have earned in such employment during the days when so employed."

This class is also intended to include those cases where an employee has not worked in the employment in which he was engaged at the time of his injury during substantially the whole of such year immediately preceding; there being, by reason of the limited term of service, no data from which his average annual earnings can be determined. In such case such earnings shall consist of 300 times the average daily wage or salary which an employee of the same class, working substantially the whole of the preceding year, in the same or similar employment, in the same or a neighboring place, shall have earned in such employment during the days when so employed.

Fourth. "In cases where the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such annual earnings shall be taken at such sum as, having regard to the previous earnings of the injured employee, and of other employees of the same or most similar class, working in the same or most similar employment, in the same or neighboring locality, shall reasonably represent the annual earning capacity of the injured employee at the time of the accident in the employment in which he was working at such time."

This classification includes all cases—

"Where the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied."

This is the sole test fixed by the legislature to determine whether or not a case comes within this class.

The question in the instant case for the court, upon the facts presented by this record, is to determine under the provisions of which of the four classifications of this statute the average annual earnings of this employee must be ascertained. It is clear that the first, second, and third classes of cases relate to employments which continue during substantially the entire calendar year. About the first there is no question. The same initial language used in the second and third classifications indicates that the legislature still had in mind employments at which employees worked substantially the whole of the year immediately preceding an injury. The employment in which the injured employee in the instant case was engaged at the time of his injury was not an employment of that character. It was not an employment in an industry which continued operations during substantially the entire year. The record shows that this is the case, not only in the Saginaw valley district, but everywhere in the coal mining industry. It also shows that the miners were paid according to the number of tons of coal mined by them, and that, under the system of operations, the miners worked on numbers; that frequently two or more miners get out coal and send it up to the surface upon one number; that the man to whom the number belonged would receive the pay for the entire output, and the miners would divide it among themselves. It also appears that the coal mines in the Saginaw valley district worked on an average of 211 days in each year. How will it be possible, in fixing the average annual wages

of deceased, to adapt these facts to the rules established by the legislature in classes 1, 2 or 3?

In our opinion the "methods of arriving at the average annual earnings of the injured employee" set forth in these classes "cannot reasonably and fairly be applied." We must therefore conclude that it comes within the fourth classification, where such average annual earnings must be determined to be such sum as, "*having regard to the previous earnings of the injured employee, and of other employees of the same or most similar class, working in the same or most similar employment, in the same or neighboring locality, shall reasonably represent the annual earning capacity of the injured employee at the time of the accident in the employment in which he was working at such time.*" Applying this rule to the undisputed facts in the instant case, we find that he was paid by his employer, in this employment in which he was engaged during the time the mine was operated the preceding year, the sum of \$507.45; that the average time in which the coal mining industry operated in that district was 211 days. It is clear, from the manner in which the men worked on numbers in this employment, that the above sum but approximately represents his entire earnings. The terms of this fourth classification indicate that the amount of compensation in the cases which come within it can only be approximated. We have already intimated that the legislative intent in enacting this legislation was to place the burden of compensation for losses caused by industrial injuries and deaths upon the several industries as part of the cost of production, in this manner to be borne by the public generally.

The foregoing consideration of these four classifications shows that the term "average annual earnings" of the injured employee, as used in this act, means his average annual earnings in the employment

in which he was engaged at the time of his injury. This appears so clearly and emphatically that it is impossible to arrive at any other conclusion and preserve what appears to have been the legislative intent to exclude other earnings in different or concurrent employments, and thus be able to distribute the burden of compensation to each of the several industries wherein the injuries and deaths may occur.

In making these classifications which we have been considering, the known and recognized incidents of industrial employments were taken into consideration. The first three relate to employments wherein operations are carried on for substantially the entire year, and may be said to include the large majority of industrial employments in the State. That there were well-known industrial employments within this jurisdiction which were not so operated must also have been within the knowledge of the legislative body. That such employments were recognized and provided for is apparent from the terms and provisions of the fourth classification. If this conclusion is not correct, we must hold that the legislature has omitted a large class of employees from the benefits of this statute. Such a construction will never be given, where another and a reasonable construction can be adopted.

Act No. 10, under consideration, both by its title and by the provisions which it contains, indicates that it was general legislation intended to apply to all employees and all industrial employments within this State, and to provide compensation to all such employees for accidental injuries or deaths resulting therefrom. It is apparent, then, that the legislation was intended to make such provision, and that section 11 of part 2 of this act was intended to apply to all cases of accidental injuries or deaths occurring in such employments.

In our opinion the legislature by this statute did in fact make provision which applied to all cases of such injuries and deaths occurring in all employments, and that, in making such provision, they included the known and recognized incident of the employment of coal mining and other employments that such employments were not carried on during the entire year. Therefore, in determining the compensation to employees injured in such employments and in arriving at a fair and reasonable basis therefor, the computation must be made under the provisions of the fourth classification of this statute, and the amount of the average annual earnings of the injured employee ascertained as near as possible.

To charge this employment with compensation for injuries to its employees on the same basis as employments which operate during substantially 300 days in the year would be an apparent injustice, as such compensation would be based on the theory of impossible earnings by the employee in that employment which operated upon the average a trifle over two-thirds of a working year. This was recognized and provided for by the legislature by omitting from the fourth classification any requirement relative to the average daily wage or salary of an injured employee. This construction, in principle, appears to be supported by the English cases involving questions of like character. *Kelly v. Spinning Co., Ltd.*, 43 Ir. L. T. J. 81; *Bailey v. Kenworthy*, 98 L. T. 333, 334; *Carter v. John Lang & Sons*, 16 Sc. L. T. 345-348; *Anslow v. Colliery Co.*, 100 L. T. 786.

In the record is an exhibit showing the annual earnings paid by appellant to the deceased from 1904 to 1912, inclusive, amounting to \$5,175.21. From this table we find that the average annual earnings paid to him during that period were \$575.02, which we will take as a basis for the computation of the com-

pensation to which the claimant is entitled. Having determined his average annual earnings, there remains nothing further to do, except to determine the average weekly wages, by dividing this sum by 52, the result of which is \$11.06, as such average weekly wages. One-half of this amount, being \$5.53, would be the amount to be paid weekly to the claimant for a term not exceeding 300 weeks.

The conclusion of law, therefore, of the industrial accident board, in determining that the average weekly wages of deceased should be computed under the second classification of section 11 of part 2 of this act, was erroneous. Its order in affirming the award made in this cause by the arbitration committee therein is therefore reversed and set aside; and this court, in cases under this act brought to this court for review, being authorized by section 12 of part 3 of said act "to make such orders in respect thereto as justice may require," does order and determine that said order of the industrial accident board be reversed and set aside, and an order entered by said board in said cause in accordance with the foregoing opinion, but without costs.

BROOKE, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

GARLINGHOUSE v. MICHIGAN CENTRAL RAILROAD CO.

MASTER AND SERVANT—RAILROADS—CAR REPAIRER—RULES, VIOLATION OF—HABITUAL UNENFORCEMENT.

A car repairer could not recover for alleged negligence of the railroad company in failing to enforce a rule to protect its employees while they were engaged in work on a car by displaying a blue flag on the car by day or blue lights by night, where it appeared from the opening statement of his attorney and from his testimony, given at a former trial, that he did not rely on the enforcement of such rule, but did rely on the promise of a superior fellow-servant to send a man to protect him, and that the accident occurred because of a failure to carry out the promise of protection.

Error to Washtenaw; Kinne, J. Submitted January 16, 1914. (Docket No. 111.) Decided October 2, 1914. Rehearing denied April 28, 1915.

Case by Frank W. Garlinghouse against the Michigan Central Railroad Company for personal injuries. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

A. J. Sawyer & Son and *Arthur Brown* (*E. R. Sunderland*, of counsel), for appellant.

John F. Lawrence (*T. D. Kearney*, of counsel), for defendant.

BROOKE, J. Upon a former trial of this case plaintiff recovered a judgment against the defendant of \$10,000. This judgment was reviewed in this court. 174 Mich. 73 (140 N. W. 646). Reference is had to that opinion for a sufficient statement of the facts involved. Upon the present trial plaintiff's counsel made an opening statement to the jury in the case, in the course of which he offered to prove:

"That the defendant at that time and for many years prior thereto had nominally in force a rule for the protection of car repairers called the 'blue signal rule,' by which car repairers and other employees of the car-repairing department, who had occasion to work on or about cars, were strictly forbidden to commence work on any car, the nature of which might require them to place themselves in a position on, under, or about the car, whereby its movement on the track could result in injury to them, without first properly protecting said car with a blue flag or flags by day, or blue lights at night; that this rule was, during the time plaintiff worked for defendant in Jackson, and for many years prior thereto, habitually and constantly violated in the Jackson yards; that for months at a time during those years there were no blue flags or blue lights provided in the Jackson yards for the use of the men; that the officers of the defendant who managed and made the rules were frequently in the Jackson yards during all those years, and were familiar with the practice of making repairs on the switch tracks of a character which required the men to place themselves in positions on, under, or about the cars where the movement of the cars could result in injury to them, without the use of either blue flags or blue lights, and knew that the blue signal rule was constantly and habitually violated in said yards, and that the men engaged in repairing cars in those yards were wholly without the protection of any rule or system making it reasonably safe to perform the work of repairing cars there."

At the conclusion of the opening statement, defendant's counsel moved for a directed verdict, which motion was granted, and judgment was entered thereon. Plaintiff now reviews that judgment in this court.

It is his claim that under the testimony of the plaintiff in the case, even though Downs be held to be a fellow-servant, he is nevertheless entitled to recover, when he shows that the rules formulated and promulgated for the safety of the employees of the defendant, including the plaintiff, were habitually violated to the knowledge of the officers of the com-

pany who "managed and made the rules." This contention would have weight, were it not for the fact that plaintiff, as is shown by his testimony upon the former trial, stated that he knew nothing of the rule in question, and that he relied upon the assurances of Mr. Downs, his fellow-servant, to afford him protection. As stated in our former opinion, he testified:

"That he understood that this protection meant that the car foreman would send a man or men with him to stand alongside the cars and notify him of the approach of an engine with cars which would put him in danger by moving the cars where he was working."

Under these circumstances, it seems to us unimportant whether the rule in question was enforced or not, because plaintiff entered upon the service which caused his injury, not in reliance upon the rules, but in reliance upon a specific assurance given him by a fellow-servant, the consequences of whose negligence may not, under the authorities, be visited upon the master. A perusal of the opening statement, coupled with an examination of plaintiff's testimony upon the former trial, convinces us that the learned circuit judge was not in error in directing a verdict for the defendant.

The judgment is affirmed.

MCALVAY, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

EARLY v. TUSSING.**1. ARBITRATION AND AWARD — CONTRACTS — DAMAGES — DELAY — BUILDING CONTRACTS.**

Under an arbitration contract submitting to the arbitrators questions relating to the performance of a contract for the construction of a building, and to questions of damage, labor or materials, the arbitrators obtained jurisdiction of the owner's claim for liquidated damages, for delay, although it was provided in the construction contract that only in case of a disagreement as to the decision of the architect, in regard to work added to or taken from the plans and specifications, should the questions be arbitrated; and although by express terms in the arbitration agreement the contract was made the sole basis of arbitration.

2. SAME—DAMAGES.

While it was competent for the parties to a construction or building agreement to stipulate for liquidated damages if the building should not be completed within the time fixed by the contract, the arbitrators could not apportion the damages between contractor and owner in accordance with the degree of blame for various delays, charging two-thirds of the damages to the contractors and the remainder to the owner.

3. SAME.

Where the parties are mutually responsible for the delays because of which the building is not completed in time, the stipulation as to liquidated damages is annulled and, in the absence of some provision under which another date can be substituted, it cannot be revived.

Appeal from Ingham; Wiest, J. Submitted November 19, 1913. (Docket No. 26.) Decided October 2, 1914. Rehearing denied April 28, 1915.

Bill by Thomas Early and William Fitzpatrick against Daniel W. Tussing to review and set aside an award made by arbitrators. From a decree for defendant, complainants appeal. Reversed.

McArthur & Dunnebacke, for complainants.

Cummins & Nichols (*Rollin H. Person*, of counsel),
for defendant.

MALVAY, C. J. The bill in this case was filed by complainants against defendant to set aside a certain award made by arbitrators. A hearing in the case resulted in a decree dismissing the bill of complaint. Complainants have appealed from such decree.

The statement of facts as presented in the brief of appellants is admitted by defendant to be "substantially correct as a history of the case, and probably as full in its recitals as is necessary to a general understanding of the controversy." We take from complainants' statement such facts as we consider material for the purposes of this opinion.

This controversy arises out of a contract made and entered into between the parties to this suit September 25, 1909, supplemented by an appendix thereto, whereby on the part of complainants it was agreed under its terms, which provided certain exceptions, to construct upon a certain foundation ready to receive the iron and mason work a certain six-story business block upon a vacant lot at the northwest corner of Washington avenue and Ottawa street, in the city of Lansing, for an expressed consideration of \$37,500. Defendant first obtained a lease of these premises in June, 1907, and in the winter of 1908-09 finally concluded to construct a business block upon them. The excavation for the basement was begun in March, 1909, and the foundation was completed in June or July following. A contract for the sidewalk was entered into by defendant in May, 1909. Another contract with a foundry company for the structural iron to be used in this building was also entered into by defendant in the same month. The foregoing contracts having been already entered into or com-

pleted, on September 25, 1909, as already stated, the contract between these parties was entered into. It will be necessary to state but few of its details. The building was to be completed on or before May 30, 1910. Complainants were "to complete and have ready for occupancy not later than March 1, 1910, all of the mercantile rooms of the basement, first and second floors," which were parts of the building already leased to a mercantile firm to be ready for occupancy on that date. Concerning that portion of the building the contract contained the following agreement:

"It is further agreed that, should the contractors fail to finish the work of completing the storerooms aforesaid at the time agreed upon, they shall pay to or allow the owner by way of liquidated damages the sum of \$25.00 *per diem* for each and every day thereafter the said works shall remain incomplete."

This is the only provision for liquidated damages provided for in the contract or any later agreement between the parties.

The original contract of September 25, 1909, contained no agreement to arbitrate. Such agreement was contained in an appendix thereto, and only related to the refusal of either party to "accept the arbitrators' decision in regard to the value of any works added [to] or omitted from the aforesaid plans and specifications."

Complainants' contract covered only the mason and carpenter work on this building. Certain material, equipment, and labor were expressly excluded, to wit, excavating basement and area, concrete retaining walls, structural iron, sidewalks, sidewalk lights, fire escapes, electric wiring, piping for compressed air, compressed air plant, gas-fitting, plumbing, steam pipes, and radiators, elevators, and machinery thereof, and the tables, counters, and shelving for the

store. All of the above-enumerated material, equipment, and labor were to be furnished by defendant. Complainants were to place and imbed in concrete the iron bases for the columns in basement and erect the structural iron for the building; the first installment of this iron to be delivered at the premises for the use of complainants on or before September 29, 1909, and the balance as required by them. Complainants entered upon the construction of the building immediately after the contract was signed. On October 2d following it is admitted that the work of construction was suspended. Defendant claims that complainants stopped work because he refused to give a bond which they arbitrarily required. Complainants contend that the work stopped because of the default of defendant relative to furnishing necessary structural iron as agreed.

Defendant conceded in the case that on January 17th, during the construction of the building, a storm sewer, or drain, on Ottawa street burst at a point on the south side of, and opposite, the building, flooding the entire basement. It is also conceded that the building was not completed within the time fixed by the contract either as to the mercantile apartments or in its entirety. Complainants contend that, notwithstanding the delays which occurred, the walls were up and the building under roof within three days of the time fixed by the contract, and that the mercantile floors were ready for occupancy the first week in June, 1910.

On the contrary, defendant insists that the building was not completed until August 1st. After the building was completed complainants asked for a settlement and payment of a balance due, and after conferences between the parties had in August, September, and October, the parties, being unable to agree, although they had adjusted most of their differences, finally on November 4, 1910, agreed to and

executed the following agreement to submit to arbitration:

"This agreement, between Thomas Early and Wm. Fitzpatrick, contractors, party of the first part, and Daniel W. Tussing, party of the second part, all of Lansing, Michigan, made and entered into this 4th day of November, nineteen hundred and ten, witnesseth as follows: That whereas the said Early and Fitzpatrick are the parties of the first part under a contract with the said Daniel W. Tussing as second party, dated September 25th, 1909, in which they agreed to build what was termed therein the 'mason and carpenter jobs' for the mercantile and office building situated on lot six, block ninety-six, of the said city of Lansing, and known as the Tussing Building; and whereas differences of opinion have arisen between the parties thereto (being the same parties as are parties hereto), as to the amount due to said Early & Fitzpatrick under same contract:

"Now, therefore, it is covenanted and agreed by and between the parties hereto that the terms and conditions of the same contract dated September 25th, 1909, are held to be the true and correct contract under which the same building was erected; that the terrazza floors mentioned therein were by agreement of the parties not built; and that the contract price for furnishing materials therein required to be furnished and the labor was \$30,500.00, plus the cost of joist as stated in said contract.

"It is further covenanted and agreed by and between the parties hereto that the said contract, in its true spirit and meaning shall be and is hereby unchanged; but it shall be, and is herein agreed that the claims of the parties hereto where disagreement has arisen upon questions involved in said contract of September 25th, 1909, shall be arbitrated by a committee of arbitration chosen according to the method agreed upon in said contract. Provided always that the arbitrators so chosen shall make the said contract of September 25th, 1909, as herein stated the basis of said arbitration.

"And it is agreed and covenanted by and between the said parties hereto that the findings of said committee so chosen shall be final and binding upon both

parties; and we agree to respect and defend the findings of the said committee whether upon question of performance, damage, labor, or material.

"THOMAS EARLY. [Seal.]

"WILLIAM FITZPATRICK. [Seal.]

"DANIEL W. TUSSING. [Seal.]"

Under this agreement the arbitrators were selected and undertook to perform their duties as such. On November 16th they made a further agreement that the award should be made not later than December 1, 1910, and also an agreement authorizing the court to immediately enter a judgment on the award according to the findings. On the same day they began to take proofs, which was continued until November 30th following. On December 1st a majority of the arbitrators made and signed their findings and award. On the same date, and before such award was made, these parties made and entered into an agreement in writing which was presented to the arbitrators, accepted by them, and made a part of their findings, and taken into consideration by them in determining their award. The following is the award, together with said agreement between the parties, which was made a part of it by the arbitrators:

"LANSING, MICH., Dec. 1st, 1910.

"TO THE CIRCUIT COURT FOR THE COUNTY OF INGHAM
AND STATE OF MICHIGAN—*Greeting:*

"The following is a schedule of findings by John C. French, Wm. E. Moore and John C. Schneider, a committee of arbitration in the case of Early & Fitzpatrick, contractors, plaintiff, and Daniel W. Tussing, owner, defendant, in settlement of matters in controversy under the contract for erecting the Tussing Building in the city of Lansing, Michigan.

"These findings are rendered with the distinct understanding that all bills for labor and material which the said Early & Fitzpatrick owe for said building shall be fully and promptly satisfied and paid by them.

"These findings are based on the contract between plaintiff and defendant, dated November 4th, 1910,

and supplied by agreement November 16th, 1910, which submitted this case with the understanding that all accounts of every kind have been amicably and satisfactorily adjusted as per statement of both parties hereto attached, except those items entered in the left-hand column of this schedule, which items have been submitted, as aforesaid, have received our careful consideration after an impartial hearing of all evidence offered by both sides and have been adjusted by us as per the following schedule, to be paid by the respective parties named as follows:

	To be Paid by Early & Fitzpatrick.	To be Paid by D. W. Tussing.
Other bills by John Toolen, \$2.88.	\$2 88	.....
Erecting elevator beam, \$22.50...	7 50	\$15 00
Two wheelbarrows, \$1.50.....	.....	1 50
Five rolls asbestos, \$12.60.....	6 30	6 30
Damaged plate glass, \$31.90.....	.....	.....
Hatchway inclosure, \$390.00.....	.....	.....
150 days' delay in completing stores at \$25.00 per day, as per contract Sept. 25, 1909.....	2,625 00	.....
Basement ventilating fixtures....	5 00	.....
Transom ventilators	40 00	.....
For leveling floors.....	.....	.....
Baseboards in elevator lobby....	9 75	.....
Brass stair rail.....	12 00	.....
Stone sill and threshold.....	10 00	.....
Early & Fitzpatrick's claim of damages .....	.....	.....
Allowance by contract of \$1.00 per square for 73 squares of roof, \$73.00.....	73 00	.....
8 kick plates for southeast doors.	20 00	.....
Total.....	\$2,811 43	

"The court is hereby instructed to issue judgment to Daniel W. Tussing for the amount of \$695.53 which is the balance due the said Daniel W. Tussing, according to the findings of the undersigned committee of arbitration in the aforesaid case, including every item which under the contract aforesaid, the evidence in the case, and the plans and specifications, were sub-

jects under the articles of agreement by which the case was submitted to us, for our deliberation.

[Signed] "JOHN C. FRENCH,
"JOHN C. SCHNEIDER,
".....,
"Committee.

"To John C. French, Wm. E. Moore and John C. Schneider, board of arbitrators, of the account of Early & Fitzpatrick and Daniel W. Tussing, as submitted by the said Early & Fitzpatrick, contractors, and Daniel W. Tussing, owner of the Tussing Building, Lansing, Michigan, according to sworn articles of agreement entered into by the said parties and dated Nov. 4th, 1910.

"Appended hereto is a correct copy of a bill presented to Daniel W. Tussing by Early & Fitzpatrick, contractors for the Tussing Building, on October 10, 1910. This account totals \$5,181.92. This account rendered by Early & Fitzpatrick was accepted by Daniel W. Tussing in its entirety, excepting such items only as had already been charged in D. B. Moon, the architect's account of extras on said building. This account of extras submitted by D. B. Moon was O. K.'d by the contractors; therefore the items of raised floors in closets, \$24.00, cutting hole through second floor, \$5.00, two windows in Dancer-Brogan's office balcony, \$32.00, total, \$61.00 (see page 4, D. B. Moon's account of extras, items checked in pencil at the right), had been included in D. B. Moon's extras and O. K.'d by contractors. These items which have been acceptably settled by Mr. Moon's bill for extras reduced the total Early & Fitzpatrick charge per bill of October 10, 1910, to \$5,120.92. This \$5,120.92, then, is the total amount charged against Tussing by bill submitted. Tussing adds to this \$95.55, the contractor's price for laying 14,700 brick and furnishing the mortar at their price of \$6.50 per M. This makes the total net charge by Early & Fitzpatrick, according to their original statement of the account and modification that the architect's account of extras O. K.'d by contractors, \$5,216.47.

"Early & Fitzpatrick admitted credits against this total charge which were agreed to by both parties as follows:

Charge for 55 hrs. Dieterle's men, at 17½c....	\$9 62
59,577 old brick at \$3.00 per M.....	178 73
\$10,000 insurance, Feb. 1 to Aug. 1.....	50 00
\$5,000 insurance, March 1 to Aug. 1.....	18 75
\$5,000 insurance, May 1 to Aug. 1.....	12 50
\$5,000 insurance, June 15 to Aug. 1.....	6 25
Half March heat bill.....	54 02
Half April heat bill.....	18 26
Half May heat bill.....	19 38
Rikerd bill for all lumber used by contractors.	2,394 91
Hardware trim (O. K'd by Tussing and Fitzpatrick)	334 04
John Toolen's bill, pump and fixtures.....	4 11
Total.....	\$3,100 57
Original contractors' total charge corrected..	5,216 47
Total of the accepted credits.....	3,100 57

Balance due contractors on items of debit
and credit as above entered, and excluding
all items upon which any controversy
exists \$2,115 90

"Dated, Dec. 1st, 1910.

"The foregoing amount, \$2,115.90, as an accepted charge against Daniel W. Tussing, taken into an account by you with such items as in your judgment come under the contract and the evidence submitted, and in accordance with the articles of sworn agreement by which we the parties, submitted the case to you, will constitute the total final settlement of the account according to your findings.

"THOMAS EARLY,

"WILL FITZPATRICK,

"In copartnership.

"DANIEL W. TUSSING.

"Witness: BERYL COOK."

The foregoing is but a very brief outline of the facts in this case, but we think it is sufficient. The record contains about 800 pages, containing pleadings, testimony, and numerous exhibits, from which we have attempted to reduce the statement of facts to its lowest terms.

These parties entered upon this arbitration and

practically concluded it before any attorneys were employed. Such part of the testimony and proceedings had before them as appear in the record were taken directly upon a typewriter as they occurred, and are made an exhibit in this case.

A careful examination of the pleadings and a reading of the entire record shows that on the part of appellants very many reasons were alleged and urged as grounds for vacating and setting aside this award. It would be practically impossible, and, we consider, unnecessary, to go into the details of all of these complaints, for the reason that most of them, not because under other conditions their relevancy and merit might not be necessarily considered in determining this case, but because the award made by these arbitrators eliminates them and reduces the questions necessarily involved to very narrow limits.

The first contention relied upon by appellants which we will consider is that the articles of submission to arbitration make the terms of the contract of September 25, 1909, the sole basis of the arbitration; that by the terms of such contract no arbitration was provided for upon any question except a disagreement as to the decisions of the architect in regard to the value of work added to or taken from the plans and specifications; and consequently that under such articles no question of liquidated damages on account of failure by the contractors to complete certain portions of the work within the specified time could be considered.

As far as the original contract with the appendix thereto are concerned, the contention of appellants is absolutely correct, but these parties voluntarily entered into this agreement to arbitrate independently of the original agreements of September 25, 1909, and which, although referring to and based upon such agreements, contain the following statement in its preamble:

"And whereas, differences of opinion have arisen between the parties thereto (being the same parties as are the parties hereto), as to the amount due to said Early & Fitzpatrick under same contract."

We find further among the covenants and agreements to the articles of submission, the following:

"And it is agreed and covenanted by and between the parties hereto that the findings of said committee so chosen shall be final and binding upon both parties; and we agree to respect and defend the findings of the said committee, whether upon question of performance, damage, labor, or material."

The liquidated damages provided for in the original contract in case of nonperformance by complainants were to be paid or be allowed to defendant; consequently a dispute "as to the amount due to complainants under the contract" would include the question of these liquidated damages. In the final clause of the contract above quoted the questions of performance and damage were included. Our opinion, therefore, is that under the articles of submission the question of liquidated damages was included. This is the important question in the case. From the record it appears that the basement rooms and first and second floors of the building, which were required to be completed by a certain date, being the only parts for the nonperformance of which liquidated damages were provided, were not so completed. On the part of defendant it was contended that this delay was of a duration of 150 days, all caused by the complainants.

The contention of complainants was that the first delay was caused by the nonfulfillment on the part of defendant of his express agreement to furnish the structural iron on a certain date and as required, and that the principal delay, which began January 17, 1910, was caused by the fault of defendant in excavating the area on the south side of the building so close to a defective storm sewer that it burst into the exca-

vation and flooded the entire basement with mud and water to a great depth, which, on account of the ensuing cold weather, became frozen so hard that it could not be removed, and created a damp condition which made impossible the plastering of the walls and completing the basement and mercantile floors any earlier.

Defendant admits that the direct cause of the flooding of the basement at this time was on account of his excavation, as stated, and the record so shows in his testimony; but he claims that, had the complainants theretofore pushed their work as they should have done, he would have had the area walls completed and thus prevented the flooding. Defendant's claim was that complainants alone caused a delay of 150 days after the 1st day of March, for which he was entitled to the liquidated damages of \$25 a day. This question of liquidated damages for the nonperformance by complainants of their contract in this respect was taken into consideration by the arbitrators, and, as the award signed by a majority shows, they found "150 days' delay in completing store, at \$25.00 per day, as per contract September 25th, 1909." An examination of this "schedule of findings" by a majority of the arbitrators shows that they undertook to, and did, in said schedule put down in a column all of the items they considered and passed upon, and in two columns opposite each item, which in the schedule had the following captions: "To be Paid by Early & Fitzpatrick," "To be Paid by D. W. Tussing,"—and set down under each caption the amounts of these items charged to each party to the arbitration. Under the item relative to the number of days' delay in completing the store, they charged to complainants for 105 days of such delay \$25 per day, making the sum of \$2,625. This was practically the entire amount charged against them in the award. It was included

with a few other small items charged against complainants, amounting to but \$186.43. The total charges found against them was \$2,811.43. From this amount the arbitrators deducted the sum of \$2,115.90, being the amount agreed upon by the parties and accepted and acknowledged in writing by defendant as due and owing by him, and directed to be taken into account by the arbitrators. This left a balance in favor of defendant of \$695.53, which the arbitrators awarded to him. For this amount the arbitrators instructed the court to enter judgment in favor of defendant. The award was filed December 2d, and on December 3d the court entered judgment thereon. This judgment was afterwards vacated on the ground of irregularities.

Following this, various proceedings were had in relation to the confirmation of the award until the filing of the bill in the instant case. We avoid any discussion of the charges and countercharges made in the briefs in this case as to the activity of defendant in drafting many papers relative to the arbitration proceedings and other matters, and also as to the conduct of the complainants and their testimony, for the reason, as stated in regard to some of the questions raised in the case, the court does not consider that they require any discussion.

As appears from what we have already stated, the crucial questions are whether these arbitrators apportioned the damage for delays, and, if so, whether such action can be sustained.

The record contains a large amount of testimony upon the subject of the delays in completing those portions of the work limited by the contract. As already stated, the testimony of defendant shows that his excavation was the proximate cause of flooding the basement, the freezing of which was the direct cause of a long delay of at least 8 weeks. His letter to com-

plainants, one of the exhibits in the case, in referring to this, said "that certain unforeseen accidents, etc., made temporary modifications of this time limit necessary needs no consideration here, as we all understand that. * * *"

The two arbitrators who took part in the award have found that the completion of the store portions of the building was delayed 150 days. They have charged two-thirds of such delay against complainants, which they have included in their final award against them. In law this amounts to an apportionment of these liquidated damages between these parties, and in effect a finding and determination that one-third of the time of delay was caused by the defendant.

It appearing from the record and from the award of the arbitrators that defendant was responsible in part for the delays in building this work by complainants, we must consider whether the apportionment of the damages made by the arbitrators can be sustained by this court.

The jurisdiction of a court in equity to consider and determine questions here involved is admitted by defendant. It is not disputed by either party but that this case falls well within that class of cases where parties may lawfully agree upon stipulated damages to be paid by a contractor in case of failure to complete the work contracted for by the date fixed. From our examination we are satisfied that the great weight of the authorities is in favor of the proposition that such damages for delays cannot be apportioned, and this rule has been applied both in courts of law and in equity. While the cases directly in point are not numerous, this rule of law has been recognized both in the courts of England and the United States.

We quote from an eminent English authority, as follows:

"Where the liquidated damages are stipulated for at so much per day or per week, there must be a definite date from which they are to run. If no such date is fixed by the contract, or if by the operation of intervening circumstances the date fixed by the contract has ceased to be operative, and there is no provision in the contract under which another date can be substituted, all right to recover the sum stipulated for as liquidated damages has been put an end to, because there is no date from which the penalties can run." 3 Halsbury's Laws of England, pp. 243-245, and cases cited in footnotes.

The learned author continues by saying that, where provisions are inserted in a contract in order to avoid destroying the right to liquidated damages by fixing a date, such right will remain. Cases coming within this class are readily distinguished from those where no such provisions are inserted, and they are clearly distinguished by the above author, as follows:

"The cases relating to release from the obligation to pay liquidated damages for delay in consequence of some delay caused by the employer seem to fall into three classes: (1) where a power to extend the time has been properly exercised; (2) where there was such a power, but it has not been properly exercised; and (3) where there was no such power."

After discussing the first class of cases, which is not applicable to this case, the author proceeds:

"The other two cases, where there is power to extend, but such power has not been exercised, and where there is no power to extend, may be considered together.

"In either of these cases the effect of delay caused by the employer is to set the time at large, and exonerate the builder from liquidated damages for delay, the general rule of law being that the performance of a condition is excused by obstruction on the part of the obligee."

Other English authorities are *Holme v. Guppy*, 3

M. & W. 387; *Dodd v. Churton*, L. R. 1 Q. B. (1897) 562.

The same rule has been applied by the United States courts, both Federal and State. *Mosler Safe Co. v. Safe Deposit Co.*, 199 N. Y. 479 (93 N. E. 81, 37 L. R. A. [N. S.] 363); *Jefferson Hotel Co. v. Brumbaugh*, 168 Fed. 867, 94 C. C. A. 279.

In *Mosler Safe Co. v. Safe Deposit Co.*, *supra*, the court said:

"Where the parties are mutually responsible for the delays, because of which the date fixed by the contract for completion is past, the obligation for liquidated damages is annulled and, in the absence of some provision under which another date can be substituted, it cannot be revived."

These American cases above cited were most of them on the chancery side of the court, and were all cases relative to questions arising under building contracts. An examination of these cases shows that the same conditions prevail in some of them which occurred in the instant case. *Jefferson Hotel Co. v. Brumbaugh*, *supra*.

It will be remembered that complainants had a contract only for the mason and carpenter work of this building, while defendant undertook all the excavation, the construction of the area walls and sidewalk, and all other things necessary to complete the building. The complainants were entitled to all the time intervening between September 25th and March 1st in which to construct the parts agreed to be finished by that date, and any delay caused by defendant during those dates could not be attributed to complainants. Such an interference amounted to a breach of contract on his part, and by reason thereof defendant lost all right to recover liquidated damages for delays. The justice of the rule is apparent. It is founded both upon reason and authority. The con-

clusion and award of the arbitrators upon this proposition was a gross and palpable mistake of law, and cannot be sustained. The award must therefore be vacated and set aside:

During the hearing of this case the record shows counsellor for defendant stated in open court that in case this award was set aside complainants were entitled to a decree against defendant for the amount of \$2,115.90, less \$186.43, the amount of the small items allowed against the contractors by the arbitrators. This was the amount stipulated and agreed upon by and between the parties in their settlement of accounts.

In our opinion, complainants are entitled to a decree in this case for such amount. A decree will therefore be entered in this court vacating and setting aside the award of the arbitrators and declaring that defendant is indebted to complainant for a balance due them on their contract in the sum of \$1,929.47, with interest from December 1, 1910. The lien of complainants for that amount, together with interest and all costs, is declared to have attached to said building and the leasehold interest of defendant in and to the premises upon which it is located.

Said decree will further provide that such amount with interest and all costs be paid by defendant to complainants on or before six months from the date of such decree, and that in default thereof the interest of defendant in said building and premises shall be sold in like manner and form as in cases of sales upon foreclosure of mechanic's liens; complainants to recover against defendant all costs of both courts to be taxed.

BROOKE, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

VAN AUKEN v. MICHIGAN CENTRAL RAILROAD CO.

1. CARRIERS—PASSENGERS—RAILROADS—LICENSEE.

Where an employee of a lumber company rode to and from his work on a logging train of the defendant railroad company, without charge for transportation, and it appeared that the defendant carried few passengers over this portion of its road, which was a logging branch, and that those who did ride were required to sign a release of liability, with a provision that the passenger assumed all risks, also that the defendant had filed and published its schedules of rates pursuant to Act No. 300, Pub. Acts 1909 (3 How. Stat. [2d Ed.] § 6524 *et seq.*), and in accordance with the provisions of section 5 of the statute was prohibited from carrying passengers free, excepting certain classes of persons (which did not include decedent), he was a mere licensee, and whether he innocently or wilfully violated the law, he was entitled to no greater rights than one who procured the pass by consenting to assume all risks of transportation.¹

2. MASTER AND SERVANT—FELLOW-SERVANTS—DEATH.

A member of a loading crew who was killed because a carload of timber was insufficiently or improperly wired by other members of the gang, was not entitled to recover for the neglect of his coemployees, in the absence of testimony to prove that the car was not properly inspected, or that due inspection would have disclosed a defect in the wiring or loading.

3. RAILROADS—LOGGING ROAD.

A railroad corporation has the right to impose such restrictions upon liability to passengers riding on a branch line on its logging trains as it may see fit; general rules in use for the operation and maintenance of trains on the main line being impracticable.

¹On the question of the degree of care owed to free passenger in absence of stipulation upon the subject, see notes in 5 L. R. A. (N. S.) 721 and 46 L. R. A. (N. S.) 142.

²For the liability of the proprietor of a logging railroad for injuries sustained by person other than employee, while being carried thereon, see notes in 12 L. R. A. (N. S.) 131 and 22 L. R. A. (N. S.) 190.

4. SAME—AGENCY.

A conductor has no authority to bind his employer by permitting or inviting the servant of another corporation to ride upon its train free of charge in contravention of the established rates and schedules.¹

KUHN, OSTRANDER, and BIRD, JJ., dissenting.

Error to Otsego; Sharpe, J. Submitted November 21, 1913. (Docket No. 69.) Decided October 2, 1914. Rehearing denied January 29, 1915.

Case by Abram A. Van Auken, administrator of the estate of Anson Maurer, deceased, against the Michigan Central Railroad Company for the unlawful killing of decedent. Judgment for plaintiff. Defendant brings error. Reversed.

Watts S. Humphrey and *George L. Alexander* (*Humphrey, Grant & Humphrey*, of counsel), for appellant.

Hall, De Foe & Hall, for appellee.

In July, 1910, defendant maintained in connection with its Mackinaw Division what is called in the record its "Haakwood Branch." This was a logging branch about 22 miles long, connecting with the main line at Wolverine. The Wylie-Buell Lumber Company were conducting a lumbering operation upon this branch. At this time (July, 1910) they were getting out sawlogs and timber for use in piling, the latter 30 feet long and 8 or 10 inches in diameter at the top and 14 to 16 inches in diameter at the butt. To facilitate the loading of these logs, the lumber company used a steam loader. This loader was mounted upon a flat car which, together with a boarding car used by the loading crew, was moved from place to place by defendant as occasion required.

¹ As to the liability of a railroad company for injury to person wrongfully on freight train by collusion with a train employee, see notes in 5 L. R. A. (N. S.) 1025 and 37 L. R. A. (N. S.) 421.

It seems to have been customary for the loading crew or some part of it to go in to Wolverine each Saturday night and there spend Sunday. Sometimes the boarding car would be run back and forth, at others the loaders would ride in the ordinary caboose attached to the train. No fare was demanded or collected from the loaders in either event. On Saturday, July 29th, a train of 10 cars had been loaded with logs—the last 3 cars being loaded with the 30-foot piling above described. This piling was loaded upon flat cars, upon the sides of which were placed stakes reaching about one foot above the level of the car floor. The logs were piled in the form of a pyramid, and were secured by No. 9 wires, passed through the pockets at the side and over the logs near each end. The wires were tightened by twisting them with an inch bar, at a point near the top of the load. Behind the cars thus loaded was placed the caboose.

Maurer, plaintiff's decedent, was a member of the loading gang employed by the lumber company. He was the operator of the steam loader. On the night in question, as the train was about to start to Wolverine, he boarded the caboose and took a position in the cupola of that car. After the train had gone about 10 miles, and when it was running at about 10 or 12 miles per hour, the forward end of one of the logs upon the car immediately in front of the caboose settled down between the two upon which it rested. This resulted in crowding the log nearest the side of the car outward and into a position where it, for a short time, hung in the wire. The wire soon broke, and the front end of the log dropped to the ground; the rear end still being held in place by the wire upon that end. As soon as the end of the log struck the ground, it caught and, as the train moved forward, the other end was driven through the end of the caboose instantly killing Maurer.

The loading was done by an experienced crew of

loaders, employed by the lumber company. They testified that it was done in the ordinary manner, and as safely as possible, according to their experience. After the loading was completed the cars were inspected by the conductor of the train, who determined that they were properly and safely loaded, and accepted them and caused them to be placed in the train. The train crew, including the conductor, were men of large experience in the handling of forest products. The car in question was loaded in pyramid form, and wired in accordance with the rules and practice of the defendant company, which has handled about 100,000,000 feet of timber per annum during the past 15 years.

It appears that the Haakwood logging branch was built in 1905 under a contract with the Wylie-Buell Lumber Company which in part provided:

"That it [the lumber company] will load and unload all cars; will not load the same beyond their marked capacity; and will comply with the rules of said railroad company as to the manner in which cars shall be loaded and the loads secured thereon.

* * * * *

"It is agreed that if any of the covenants on the part of the railroad company herein contained shall, at any time, be adjudged by the interstate commerce commission, or by the commissioner of railroads of the State of Michigan, or by any court of competent jurisdiction, to be in violation of the law, said railroad company shall not be required to perform said covenant or covenants, but this agreement shall nevertheless in all other respects continue in force according to its terms."

The agreement contains no covenant on the part of defendant to transport free of charge, the steam loader, the boarding car, or the men engaged in loading, yet there seems to have grown up a practice to do all these things. The loaders were carried free while all other woodsmen in the employ of the lum-

ber company were charged fares when going to and from their work. Very few passengers were carried, and when any presented themselves for carriage they were required, under the rules of the company, upon payment of fare, to sign the following release:

"Good only when officially executed by conductor as indicated by punch marks in amount column. This permit is accepted by the holder with a full understanding that this company is not a common carrier of passengers by its freight trains; that such trains are not safe as passenger trains, and do not stop at station platforms, and the holder of this permit assumes all risk of injury from accidents while riding on or getting to and from the train. If used as half fare the parent or guardian must sign the release. Only hand baggage will be carried. No baggage will be checked on this permit.

"I agree to the above contract.

".....
 "[Signature of Purchaser.]"

The schedule of rates governing the Haakwood Branch, published and filed according to law, was as follows:

"One way train fares for use of conductors in collecting cash fares on logging branches of Mackinaw Division between stations where no tickets are used. Passengers will be carried on freight trains between stations on logging branches Mackinaw Division, Michigan Central Railroad, at the fares named below, and subject to the following conditions. Conductors will issue to each passenger a cash fare permit, form L. T. D., requiring each passenger to sign the release on the back thereof, facsimile of which is shown below. Cash fare permit will not be valid for passage unless signed by the passenger."

Act No. 300 of the Public Acts of 1909 (3 How. Stat. [2d Ed.] § 6524), is regulatory of common carriers. Section 5 thereof prohibits railroads from carrying passengers free, except employees and certain other enumerated persons, of whom plaintiff's decedent was not one. The same section makes a vio-

lation of this provision a misdemeanor, punishable by a fine of from \$100 to \$500. The passenger accepting free transportation is subjected to the same penalty as the carrier who furnishes it.

Section 10, subd. (a) compels the publication and filing of schedules. It is undisputed that this portion of the act was complied with by defendant, and that no other rates or concessions were in effect, except as shown by the schedules on file, at the time Maurer received his injury.

The fourth count of plaintiff's declaration sets out the various duties of defendant and the several breaches thereof. It is further charged:

"That upon, to wit, the day aforesaid, plaintiff's intestate was employed by, to wit, one Frank Buell as engineer of a certain steam log loader then in use at and about certain logging, banking, and loading grounds upon said Haakwood Branch of defendant's said railroad at and near what is commonly known and referred to as Doane's switch, in the township of Waverly, Cheboygan county, and that under and in pursuance of a certain practice, understanding, and agreement between said defendant and intestate's said employer, said defendant undertook, consented, and agreed to carry and transport plaintiff's intestate and others similarly employed upon and about said log loader from the point where so employed over and along said Haakwood Branch and to the main line of said railroad and elsewhere upon its freight and logging trains operated upon such branch, and for a long time prior thereto had made it a practice to carry and transport such persons upon said trains and within the way car thereof and otherwise.

"That upon, to wit, the date aforesaid, the plaintiff's intestate boarded a certain log and freight train at, to wit, said Doane's switch, and entered the way car thereof for transportation thereon in accordance with the usual practice in that regard, and at the invitation and with the knowledge and consent of said defendant, and said defendant, in pursuance of said practice and under such certain understanding and

agreement, undertook and consented to carry and transport said plaintiff's intestate upon said train and in the way car thereof from, to wit, said Doane's switch to, to wit, Wolverine, to wit, Vanderbilt, upon the main line of said railroad.

"And plaintiff alleges that, defendant having so undertaken and agreed to carry and transport plaintiff's intestate as aforesaid under the said practice, understanding, and agreement, it then and there became and was the several duty of defendant."

The court, after refusing to direct a verdict in favor of defendant, submitted the case to the jury under the fourth count.

Upon the question of defendant's negligence the court charged:

"Under the evidence in this case the only duty which defendant owed to plaintiff's decedent was to properly inspect the loaded car from which the log which killed decedent fell. This duty does not make defendant an insurer that the log would not fall from the car. And if you believe from the evidence in this case that the employees of the defendant were competent men for that duty and made a reasonably careful inspection of said car, your verdict must be for the defendant—and determined that the car was safe, I would add to that."

And further:

"There is, however, a preliminary question which I think you should first settle or first consider before you go into this question of negligence. That is as to whether or not the plaintiff is entitled to recover at all. It is the claim of defendant that Mr. Maurer was a trespasser on this train. In other words, that he had not any right to be there or to ride there without paying his fare. Attention has been called, and I think the statute has been read in your presence—if not I state it to you—that it is the law of this State that no one has any right to ride upon a passenger train or any train carrying passengers, in any way, without paying fare. The law makes it a criminal offense for any one to so ride and it makes it a crim-

inal offense for the conductor to permit any one to ride upon the train without paying his fare. Now the claim of the defendant is that this was the way in which this man rode, and I say to you as a matter of law that if he was so riding and knew he was so riding in violation of this law, he cannot recover in this case. But it is the claim of the plaintiff that he was not so riding. That while he did not personally pay his fare, that he had reason to believe, and they claim that he did believe, that he had a right to be carried under some arrangement or agreement made by his employer, Mr. Buell, and the railroad company, whereby these loaders were to be carried. Now, if you find that to be true, if you find that this man believed—and you must take the evidence of the conductor as to what he believed, and also the evidence of the other loaders who have been sworn—if you find that this man who was killed, Mr. Maurer, believed that he had a right to ride on this train, and that he was not violating any law in doing it; that his carriage was in some way arranged for by his employer—then I say to you that he was lawfully on the train, and if he was lawfully there the defendant owed him a duty. Now, if you find that he was lawfully on the train, we next come to the question as to what duty the defendant company owed him and the claimed act of negligence on which the plaintiff relies.”

Plaintiff having recovered a judgment for \$5,500, defendant reviews the case in this court by writ of error.

BROOKE, J. (*after stating the facts*). The evidence introduced on behalf of plaintiff conclusively shows that the load in question was loaded by experienced men in accordance with the rules of the defendant company and a practice which had prevailed for many years. We think it also sufficiently appears that the method followed had proven reasonably safe and efficient. There is no testimony in the record tending to show that the conductor, or any member of the crew of the train, was either inexperienced or in-

competent. The inspection made by the conductor was the usual one, and he testified that he believed the car to be safely loaded; otherwise he would have refused to receive it in his train. Nor is there any evidence that a proper inspection would have disclosed a defect in the wiring. The loading and wiring were done by fellow-servants of Maurer and every log in the load was placed in position by himself, operating the steam loader, under the direction of the top loader. If the car was improperly loaded or wired, it would seem that the negligence involved would be that of a fellow-servant. *Powers v. Lumber Co.*, 92 Mich. 533 (52 N. W. 937).

But be this as it may, there is, in our opinion, another and an insurmountable obstacle to plaintiff's recovery. The statute (Act No. 300, Pub. Acts 1909) absolutely prohibits defendant from furnishing, and all persons from accepting, transportation except in compliance with the provisions of the law. Had plaintiff's decedent complied with the lawful requirements for transportation over this logging branch, the terms of his contract would have prevented recovery. Can it be said that because he (either innocently or wilfully) violated the law, he is thereby placed in a better position than he would have occupied had he complied therewith? We think not. Maurer was not a "passenger" in the ordinary acceptance of that term, upon a passenger train. He was at most a bare licensee, to whom defendant owed no duty except to refrain from injuring him wantonly or wilfully. 3 Elliott on Railroads, § 1255, and cases cited.

The cases cited and relied upon by plaintiff have been examined. They are cases based on the carriage of passengers upon passenger trains, and are therefore not applicable to the case at bar, where the train was not a passenger train, and where the conductor

thereof was held out to the public as one having a definite and limited authority as to the terms upon which passengers should be carried. Defendant had the right to impose such restrictions touching its liability as it saw fit with reference to the carriage of passengers upon its logging trains. *Arnold v. Railroad Co.*, 83 Ill. 273 (25 Am. Rep. 386). We have recently held that the general rules in use for the operation and maintenance of trains on the main line are impracticable and inapplicable to logging roads. *Ingersoll v. Railway Co.*, 168 Mich. 380 (134 N. W. 441).

The learned circuit judge predicated plaintiff's right to recover upon Maurer's belief "that he had a right to ride on this train, and that he was not violating any law in doing it." That is to say, that the consequences of an illegal act may not be visited upon one who ignorantly violates the law. Aside from the fact that the record is barren of evidence as to what Maurer believed when he took passage upon the train, it is clear that his ignorance of the law, if it existed, cannot affect his legal rights. 1 Elliott on Evidence, § 96. 1 Jones on Evidence (1st Ed.), § 20.

The conductor had no authority to bind defendant by inviting or permitting Maurer to ride upon a logging train in contravention of its published schedule and the statute. See *Moore v. Railroad Co.*, 115 Mich. 103 (72 N. W. 1112).

We conclude that a verdict should have been directed in favor of defendant.

The judgment is reversed, and there will be no new trial.

MCALVAY, C. J., and STONE, MOORE, and STEERE, JJ., concurred with BROOKE, J.

BIRD, J. (*dissenting*). Being unable to agree with Mr. Justice BROOKE in the conclusions he has reached in this case, I herewith submit my own views.

The declaration counts upon the fact that the car was improperly loaded and also upon the want of a proper inspection. Experienced loaders gave evidence on the trial that the car was improperly loaded. The testimony on both of these questions was ample in my judgment to carry them to the jury. But it is said that the deceased was a fellow-servant of the loaders, and therefore plaintiff cannot recover. Notwithstanding this fact, if the defendant was negligent in its inspection of the car before placing it in the train, the fact that the deceased was a fellow-servant of the loaders would furnish no protection to defendant against its own negligence. *McDonald v. Railroad Co.*, 108 Mich. 7 (65 N. W. 597); *Noble v. Steamship Co.*, 127 Mich. 103 (86 N. W. 520, 54 L. R. A. 456, 89 Am. St. Rep. 461); *Welch v. Traction Co.*, 154 Mich. 399 (117 N. W. 898).

The right to recover is finally denied plaintiff on the ground that in boarding the train to ride from his work to his home in Wolverine the deceased violated Act No. 300 of the Public Acts of 1909 (3 How. Stat. [2d Ed.] § 6524), prohibiting free transportation. From the testimony it clearly appears that the deceased understood that he had a right to ride by reason of some arrangement between his employer and defendant. The conductor recognized this right and permitted him to ride, and, from the testimony, it further appears that in 1907 some agreement was made whereby the loaders were to be carried to and from their work. If the transportation of the loaders was being taken care of by the agreement, the deceased was not violating the act prohibiting free transportation.

But whatever the facts are concerning the agreement, it was conclusively shown that both the deceased and the conductor understood that plaintiff's intestate was to be carried to and from his work. This being so, the deceased thereby became a passenger and was

entitled to the same protection against negligent injuries that other passengers were entitled to on the logging train. It is said his belief that he had a right to ride and his ignorance of the law cannot avail him. If the deceased, in good faith, believed he had the right to ride, as the jury found by their verdict, he could not be guilty of *wilfully* violating the law. But suppose he did know the law and was in doubt about his right to ride, but was accepted and recognized as a passenger by the conductor, how does that absolve the defendant from answering to him or his estate for negligent acts for which it would be obliged to answer to any other passenger? If it is to be held that the company is absolved because the deceased was riding in violation of law, what becomes of the case of *Van Auken v. Railway Co.*, 96 Mich. 307 (55 N. W. 971, 22 L. R. A. 33), wherein it is held:

"That a party traveling upon the highway upon a Sabbath, either from necessity or for pleasure or business, who is injured by a collision with a railway train at a crossing, is not barred from recovery against the [railroad] company for its negligence from the fact that the injury occurred on Sunday."

The only difference between that case and this is that in the case cited the plaintiff alone was violating the law, whereas in this case it is said both plaintiff and defendant were violating it. The rule governing such cases is very clearly laid down by Hutchinson on Carriers (2d Ed.), (section 566).

"The carrier is liable to persons whom it accepts for transportation over its line, and from whom it demands no fare, to the same extent that it is liable to passengers who pay fare. A person riding on a free pass is as much a passenger as if he were paying full fare, and if the pass is given for a valuable consideration, he is a passenger for hire. The fact that the carrier is prohibited by law from issuing free passes does not render a person a trespasser who travels upon such a pass unlawfully issued to him.

If the pass is unlawful, the conductor should demand the regular fare, and his failure to do so will not make the traveler a trespasser, nor destroy his rights as a passenger." [5 Am. & Eng. Enc. Law (2d Ed.), pp. 507, 508.]

This rule has been followed by many State courts and by the Federal Supreme Court. *Buffalo, etc., R. Co. v. O'Hara*, 3 Penny. (Pa.) 190; *McNeill v. Railroad Co.*, 135 N. C. 682 (47 S. E. 765, 67 L. R. A. 227); *John v. Railway Co.*, 42 Mont. 18 (111 Pac. 632, 32 L. R. A. [N. S.] 85); *Bradburn v. Light Co.*, 45 Wash. 582 (88 Pac. 1020, 14 L. R. A. [N. S.] 526); *Gabbert v. Hackett*, 135 Wis. 86 (115 N. W. 345, 14 L. R. A. [N. S.] 1070); *Schuyler v. Southern Pacific Co.*, 37 Utah, 581 (109 Pac. 458); *Id.*, 37 Utah, 612 (109 Pac. 1025); *Southern Pacific Co. v. Schuyler*, ✓ 227 U. S. 601 (33 Sup. Ct. 277, 43 L. R. A. [N. S.] 901).

The last case cited deals with the penalty clause of the Hepburn act (Act June 29, 1906, chap. 3591, 34 Stat. 584, § 1 [U. S. Comp. Stat. Supp. 1911, p. 1284]) which makes both the giver and receiver of free transportation equally guilty of a violation of the act. It is said:

"But, finally, it is argued (b) That it was beyond the power of the State court to 'read into the Hepburn act an exception in favor of gratuitous passengers,' thereby (as is said) enlarging the class to whom Congress limited the right of free interstate transportation. This is ingenious, but, as we think, unsound. As applied to the concrete case, it is equivalent to saying that the operation of the Hepburn act is such as to deprive one who, in good faith and without fraud, and with the consent of the carrier, but in actual though unintentional violation of the prohibition of the act, accepts a free passage in interstate transportation, of the benefit of a rule of local law that renders the carrier in such circumstances responsible for exercising care for the passenger's safety because the carrier has voluntarily undertaken the

burden of such care. But the act itself declares what penalty shall be imposed for a violation of its prohibition:

“Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass or free transportation, shall be subject to a like penalty.”

“This penalty is not to be enlarged by construction. Neither the letter nor the spirit of the act makes an outlaw of him who violates its prohibition by either giving or accepting gratuitous interstate carriage. The deceased no more forfeited his life, limb, or safety, and no more forfeited his right to the protection accorded by the local law to a passenger in his situation, than the carrier forfeited its right of property in the mail car upon which the deceased rode. His right to safe carriage was not derived, according to the law of Utah, from the contract made between him and the carrier, and therefore was not deduced from the supposed violation of the Hepburn act. It arose from the fact that he was a human being, of whose safety the plaintiff in error had undertaken the charge. With its consent he had placed his life in its keeping, and the local law thereupon imposed a duty upon the carrier, irrespective of the contract of carriage. The Hepburn act does not deprive one who accepts gratuitous carriage, under such circumstances, of the benefit and protection of the law of the State in this regard.”

In my opinion the judgment of the trial court should be affirmed.

KUHN and OSTRANDER, JJ., concurred with BIRD, J.

MCGARY v. BUICK MOTOR CO.

1. EVIDENCE—MASTER AND SERVANT—PERSONAL INJURIES—NEGLIGENCE—ELEVATORS.

It was not erroneous, in a personal injury action, instituted by an employee against his employer for injuries received when the freight elevator that carried him tipped up and caused the materials upon it to fall against him, to receive evidence of subsequent action of the elevator under operation, where, during the course of the trial, experiments were made in the presence of the jury to show the action of the machinery.¹

2. NEW TRIAL—MOTIONS—PERSONAL INJURIES.

Although the trial judge expressed his views, in denying a motion for a new trial, that he would have determined the case in a different manner than the jury decided it, and that he did not believe that any negligence was made out, the Supreme Court will not reverse his ruling denying defendant's motion for a new trial, unless the verdict is against the overwhelming weight of the evidence.

3. MASTER AND SERVANT—NEGLIGENCE—DEFECTIVE MACHINERY.

Evidence tending to show that defendant's elevator had a broken shoe or guide which permitted the platform to tilt and throw the freight against plaintiff, *held*, to present a question for the jury as to alleged negligence of the employer.

Error to Genesee; Wisner, J. Submitted April 14, 1914. (Docket No. 33.) Decided October 2, 1914.

Case by Edward McGary against the Buick Motor Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Austin J. Spaulding and Carton, Bray & Stewart,
for appellant.

Farley & Selby, for appellee.

¹Upon the question of evidence as to conditions before and after accident, see note in 32 L. R. A. (N. S.) 1093 and 1103.

MOORE, J. In March, 1912, the plaintiff was employed by the defendant to operate a freight elevator in one of its factory buildings. He received injuries, for which he brought this suit. From a judgment in his favor, the case is brought here by writ of error.

The errors assigned are grouped by counsel as follows:

(1) It was error to permit testimony as to the behavior of the elevator after the accident.

(2) The court erred in refusing to grant a new trial.

(3) The court erred in refusing to direct a verdict in favor of the defendant.

The elevator was constructed in the usual manner of freight elevators. It is the claim of plaintiff that he had worked upon the elevator something more than a year without having any trouble; that, about a week before he was injured, the elevator was carrying a truck load of heavy boxes, and, when an attempt was made to run the truck out on the third floor, the elevator tilted, throwing off the boxes, and plaintiff narrowly escaped injury.

It is claimed the millwright found that a metal shoe which acted as a guide was split from top and bottom, and was held in place only by one bolt.

Plaintiff claims, after the boxes were thrown off, he notified the superintendent, who promised to have the trouble remedied at once, and that plaintiff, supposing this had been done, continued to operate the elevator for about a week, when a truck loaded with dashes, making a heavy load, was run up to the third floor, when, in attempting to run the truck off the elevator, it again tilted, throwing the dashes over plaintiff, and injuring him.

The action was defended on the principal ground that the guide shoe in question, whether broken or not, and whether on or off, did have and could have no influence or bearing upon the action of the ele-

vator. It appears that, when the truck was to be run out of the elevator upon the factory floor, two maple boards, five or six inches wide and several feet long, were put under the front wheels of the truck, extending from there out upon the floor of the factory, and it is claimed by the defendant that the breaking of one of these boards was the cause of the accident.

An attempt was made to show by the witness, who ran the elevator after plaintiff was injured, how it acted, and the testimony was excluded.

On the part of the defense, a witness was being examined as to the elevator, when the following occurred:

"Q. Now, since you testified before and gave your opinion, have you made any experiment which gave you additional knowledge which you did not have at that time?

"A. Yes, sir; I have.

"Mr. Selby: I object to that as incompetent.

"Mr. Farley: Do you want to go into the testimony as to the new shoe? If that proposition is taken up, we want an opportunity to go into it, too. (Question and answer repeated.)

"The Court: That is competent.

"Mr. Farley: The proposition, your honor, is, if they propose to show the effect of the putting on of this new shoe, I suppose that will open up the proposition so that we can go into that also, if it is competent for them.

"The Court: If they introduce anything now, you have got a right to controvert it; there is not any question about that; but it is certainly competent for him to show whether he has made any experiment which has changed his mind in respect to it in any way.

"Mr. Selby: The objection relates to any condition that may exist to the elevator since.

"The Court: What say?

"Mr. Selby: The objection relates to any conditions which he may have observed in the elevator since that time. You will remember when the question was put to Mr. Eberhardt as to how it acted im-

mediately after the new casting was put on, as compared with its actions before, Mr. Bray objected to the question, and it was ruled out as relating to something that occurred after the accident, and my objection only relates to anything that he may have discovered.

"The Court: If that elevator is in the same condition it was before the accident, they can show any experiment that had been made with it to test it; not only that, if they want to, I will send the jury over there to see it. I think they can get a better idea by looking at that elevator than they can by volumes of testimony in regard to how it is constructed, and all about it.

"Mr. Bray: I would be very glad to shorten this up and let the jury look at it.

"The Court: If you request it—you have given some testimony now tending to show no change has been made in this plank you speak of.

"Mr. Selby: Under that condition, will your honor say the testimony of Mr. Eberhardt, as to just the way the elevator acted immediately before, as compared with its condition immediately after, the new casting was put on, would be competent?

"The Court: It would be a question for the jury whether it did or not.

"Mr. Bray: I did not intend to go into any question of how the elevator itself acted after the new shoe was put on. I only had in mind an experiment that was made for the purpose of testing whether that shoe on or off made any difference with the action of the elevator; that is all.

"Mr. Farley: Of course the evidence of Mr. Willis was that there was no plank on there; he did not see any; and he helped take off the casting; that there was no plank on there; that is Mr. Willis' testimony. Of course we don't know that the conditions are the same.

"The Court: The witness swears they are—swears every one of those 16 elevators are built the same way with that plank in, just the same way. Now, that is sufficiently broad to show at least a scintilla of evidence that there has not been any change.

"The Witness: In the whole 16 there are 2 that have not any plank on.

"The Court: Two out of the 16.

"The Witness: The Morris-Williams type, they don't have any plank.

"The Court: That is a different kind of elevator?

"The Witness: A different kind of elevator.

"The Court: All we want to get at is justice; that is all. We don't want any technicalities or confusion of witnesses.

"Mr. Farley: I would suggest that if we could also have a truck loaded with 256 dashes, and run it on there into the center of the elevator, and run it off, and see whether it is safe.

"The Court: The proper way to do is to go over there and let the jury inspect the elevator, then put a truck on with this kind of a load on it and with this steel shoe in place, run it up to the floor, and see how much the tilt is when that load is run off, then take it down and take off the steel shoe, and run it up to the same place with the same load on, and see whether there is any difference in the tilt or not. That is a proper experiment to make, in my judgment.

"Mr. Farley: That would be a very good experiment.

"The Court: Using the running board the same as was used on that occasion.

"Mr. Bray: It may take some little time.

"The Court: We want to get at the justice of this thing.

"Mr. Bray: It may take some little time to prepare this load.

"Mr. Farley: We would rather not have it prepared.

"The Court: It is not necessary to put on a load of dashes. Put on a load of the same weight; put on some castings that will weigh the same amount.

"Mr. Bray: We will be very glad to do it. That is the identical experiment I was going to ask him about. It would please us very much. That is the identical experiment I was going to ask him about.

"The Court: That is certainly a fair proposition.

"Mr. Farley: I think that is very fair.

"The Court: That is what we will do."

Later, at the request of defendant, plaintiff consenting thereto, the jury were taken to the plant and

the experiments were made. Upon the record as made, we think the testimony was competent.

Groups 2 and 3 may be considered together.

It was the claim of defendant that the metal shoe was bolted to a plank just below it, and that the ends of the plank would fit the guide posts so snugly that the elevator would not tip, even though the metal shoe was broken. The plaintiff claimed that the metal shoe was bolted to an I-beam and not to a plank, and that the tilting occurred because of the broken shoe.

We have already stated the jury were taken to the elevator and saw it operated. At the close of the testimony the following occurred:

"Mr. Bray: I would like at this time to renew my motion and ask for instruction, your honor.

"The Court: Well, I think I will have to submit it to the jury whether or not the broken casting caused this accident or not.

"Mr. Bray: All right. We understand that is practically the only question in the case.

"The Court: That is the only question I see now. They have attributed a broken casting as the cause of the injury. Unless the jury can find the broken casting did it, in my judgment the plaintiff has no case, but I am going to submit that to the jury."

The court, after stating the claims of the respective parties, and that, unless the broken shoe caused the injury, there could be no recovery, charged the jury in part as follows:

"I charge you that if you find that the shoe or casting under the floor of the elevator was so broken as to cause the elevator floor to sway, tilt, and sag in an unusual manner and to a dangerous extent, at the point where the loaded truck was being removed, and if you find that such broken casting was the efficient and proximate cause of the loaded truck and dashes being overturned, and that such loaded truck and dashes would not have overturned except for such defective casting, you would then be warranted in finding such defective casting or shoe was the proxi-

mate cause of the injury, even though you may find that one of the running boards placed across the opening between the floor of the elevator and the factory floor may have broken. * * * You will observe, in this case, that the negligence counted upon by the plaintiff, which the plaintiff claims entitled him to recover, is the broken condition of a casting under the elevator floor, the guide, and his contention is that that contributed to the tipping over of the truck. Now, upon that subject, of course, you will consider all the evidence in the case, the evidence here that below or above that shoe was a wooden plank with a notch in it of practically the same size that is in the casting below. You will consider the testimony given here in respect to that, and will consider the conclusion you may have reached from a personal examination of the elevator yesterday. I stated to all of you (there in the hearing of all of you) that you should make a special examination to determine in substance whether or not that plank bore any evidence of having been recently placed there, or, rather, you should determine whether it was there as long ago as the time that this accident occurred, and if you should find from the evidence, or not be able to say that such was not the fact, that that plank was in position at the time of this accident, and that it would not permit any more swaying of that elevator than would exist under ordinary circumstances, and with a perfect casting there, then, of course, there could be no negligence in respect to that casting that would entitle the plaintiff to recover, because certainly if that shoe (if that wooden shoe) was in existence at the time of the accident, and permitted no more swaying with the casting actually taken off, it would certainly be as serious a defect as to have a broken casting there to have none at all, so, if you should conclude that existed at that time, the plaintiff could not recover, and, in order to recover, you must find that the evidence preponderates in favor of the proposition that that wooden shoe was not there, or, if it was there, that it did permit a swaying. * * *

"Not only that, gentlemen of the jury. There is another proposition. Having considered all of the evidence pro and con in respect to this issue, and the tilting of the elevator, and all that sort of thing, you

then naturally consider the question of this running board that was used as a skid to reach from the elevator to the floor, and, if you should conclude that the breaking of that skid was the proximate cause of that car tipping over and inflicting such injuries as plaintiff has suffered, then the plaintiff cannot recover."

In overruling the motion for a new trial, the court made reference to the fact that the case had been twice tried, and to the expense to the county of the litigation, and said in part:

"Well, the first jury disagreed. It was submitted to a second jury and, I think, fairly submitted. I do not believe the court committed any error, unless it was an error of submitting it to the jury at all. The charge was clearly in favor of the defendant, if the jury paid any attention to it, but they found a verdict. And while the court cannot bring itself to agree with the jury in that respect, for my verdict would have been different under the proofs, yet there is no use of having a jury, if you do not let them judge of the facts. I disagree with them on two grounds: *First*, I do not believe that the Buick Motor Company was guilty of any negligence; and, *second*, I have grave doubts whether the condition of Mr. McGary was at all attributable to the accident he had on that occasion. I am not a medical man, but I have some slight idea of mechanics, and it does not look to be a mechanical proposition that such an injury as he complains of could be attributed to the accident he received there. But I am not the judge of that. There was medical testimony that it might be attributable to such an accident, and the jury found that it was."

In his order overruling the motion for a new trial, the court gave his reasons for doing so in part:

"(5) Because the verdict of the jury is supported by the evidence received on the trial of said cause.

"(6) Because the verdict of the jury is not against the weight of evidence offered and received in the trial of said cause. * * *

"(10) Because the broken shoe or casting, as al-

leged in plaintiff's declaration, and under the proof offered in respect thereby by the plaintiff upon the trial of said cause, was the proximate cause of the accident which resulted in the injury to the plaintiff."

Counsel for appellant lay much stress upon what the trial court said about his own belief of the negligence of defendant, and insist a new trial should have been granted, citing *Nelson v. Dutton*, 51 Mich. 416 (16 N. W. 791), and *Krouse v. Railway*, 166 Mich. 147 (131 N. W. 548), and other cases cited in brief of counsel. A reference to them will show they are not controlling upon the record made.

The language of Justice STONE is pertinent upon the question whether a verdict should have been directed as well as upon the question of a new trial. We quote from *Gardiner v. Courtright*, 165 Mich. 54 (130 N. W. 322):

"So we are brought back to the question whether or not the verdict was against the weight of evidence. Upon this subject counsel for appellant lays great stress upon the number of witnesses, as to the claimed admissions of the plaintiff. This court has spoken so often upon the subject of preponderance of evidence, and the convincing weight of evidence being generally a question for the jury, that we do not need to do more than refer to some of the cases. *Strand v. Railway Co.*, 67 Mich. 380 (34 N. W. 712); *McIntosh v. McIntosh*, 79 Mich. 198 (44 N. W. 592); *Hoffman v. Loud*, 111 Mich. 156 (69 N. W. 231); *Dupuis v. Traction Co.*, 146 Mich. 151 (109 N. W. 413).

"The rule is well settled that this court will only reverse a case upon the question of the weight of the evidence when the verdict is against the overwhelming weight of the evidence. The verdict must be clearly against the great weight of the evidence, to require this court to overrule the decision of the circuit judge refusing a new trial. This rule has been repeatedly stated by us. *Wheeler v. Jenison*, 120 Mich. 422 (79 N. W. 643); *Brennan v. O'Brien*, 121 Mich. 491 (80 N. W. 249); *Stevens v. Soap Works*,

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134 Mich. 350 (96 N. W. 435); *Hintz v. Railroad Co.*, 132 Mich. 305 (93 N. W. 634); *Saginaw Milling Co. v. Mower*, 154 Mich. 620 (118 N. W. 622); *Malinowski v. Railway*, 154 Mich. 104 (117 N. W. 565); *Muir v. Corset Co.*, 155 Mich. 624 (119 N. W. 1079); *Jackson v. Railway Co.*, 161 Mich. 163 (125 N. W. 763); *Matla v. Vehicle Co.*, 160 Mich. 639 (125 N. W. 708); *In re Parr's Estate*, 161 Mich. 244 (126 N. W. 197); *Spray v. Ayotte*, 161 Mich. 593 (126 N. W. 630); *In re Hoyles' Estate*, 162 Mich. 275 (127 N. W. 284)."

See, also, *Fike v. Railroad Co.*, 174 Mich. 208 (140 N. W. 572); *Druck v. Lime Co.*, 177 Mich. 364 (143 N. W. 59).

In the instant case there was a sharp conflict in the testimony as to some of the material issues. At the request of the defendant, the jury were taken to the plant and saw the elevator in operation. The judge in his charge, as already appears, suggested:

"I stated to all of you (there in the hearing of all of you) that you should make a special examination to determine in substance whether or not that plank bore any evidence of having been recently placed there, or, rather, you should determine whether it was there as long ago as the time that this accident occurred, and if you should find from the evidence, or not be able to say that such was not the fact, that that plank was in position at the time of this accident, and that it would not permit any more swaying of that elevator than would exist under ordinary circumstances, and with a perfect casting there, then of course there could be no negligence in respect to that casting that would entitle the plaintiff to recover."

We think it cannot be said upon this record there was no case for a jury.

Judgment is affirmed.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

STETSON v. MACKINAC TRANSPORTATION CO.

1. MASTER AND SERVANT—NEGLIGENCE—EVIDENCE.

Evidence that plaintiff, who claimed to be in defendant's employ in the engine room of a ferry boat, was ordered to make the boat fast to the dock, and in doing so he was caught by the cable, and, as defendant contended, because of the ordinary tightening of the same, he was struck and injured, plaintiff testifying that the accident was caused by the starting of the engines before he had time to get out of the way, *held*, to present issues of fact for the jury as to the existence of the relation of master and servant and the claim of negligence.

2. WITNESSES—EVIDENCE—MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED AGENT—CORPORATIONS.

Before evidence concerning instructions which were given plaintiff by a deceased officer of defendant corporation could be excluded from the record as equally within the knowledge of deceased, it must be made to appear that the testimony and facts were not within the knowledge of any surviving officer or agent, within the express conditions of section 10212, 3 Comp. Laws (5 How. Stat. [2d Ed.] § 12856).

3. DAMAGES—EXCESSIVE VERDICT—NEW TRIAL.

Held, also, that \$5,000 was not an excessive verdict for the paralysis and substantial loss of use of plaintiff's leg, accompanied by severe pain; his earnings having amounted to \$45 per month and board, plaintiff being about 34 years of age.

Error to Cheboygan; Sharpe, J. Submitted April 16, 1914. (Docket No. 48.) Decided October 2, 1914. Rehearing denied December 19, 1914.

Case by Don C. Stetson against the Mackinac Transportation Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

James H. Campbell, for appellant.

C. S. Reilley, for appellee.

MOORE, J. This is a personal injury case. From a judgment of \$5,000 in favor of the plaintiff, the case is brought here by writ of error.

The plaintiff was employed in the engine room of a steam ferry boat 400 feet long and 90 feet beam, used to transfer loaded railroad cars and engines across the straits of Mackinac. The plaintiff was coming from his home to the dock to go to work upon the boat, at 12 o'clock noon. When he got to the dock, which projects into the waters of the straits several hundred feet, the boat was coming across the straits. The boat came to the dock headed north, with its side to the east end of the dock. It was desired to shift her position so that the side would be on the south side of the dock with her stern toward the land. To accomplish this a steel cable $1\frac{1}{2}$ inches in diameter, with a loop in the end of 5 to 8 feet, was passed through a chock hole in the side of the boat about 10 or 12 feet above the water. Attached to the loop was a heaving line 50 feet or more in length. The other end of the cable was wound around a capstan in the boat operated by a steam engine.

It is the claim of the plaintiff that the heaving line was thrown to him by those in authority over him on the boat, they at the same time calling out to him to throw the loop over a large cleat in the dock; that he did so, and before he could get out of the way the engines of the boat were started, the cable was drawn taut, and he was struck by it and was severely hurt.

It was the claim of the defendant that there was no force applied to the cable except to start the capstan in motion.

The other claims will be considered in connection with the discussion of the errors assigned.

The first assignment discussed is stated by counsel as follows:

"The defendant contends that the evidence does not sustain the charge of negligence of the defendant; that the evidence is conclusive to the contrary; and that a verdict should have been directed for the defendant.

"The plaintiff is not entitled to recover, except upon the ground that after the cable had been placed upon the cleat the boat was, by the action of the employees of the defendant in charge of it and by the application to the boat of her steam power, by the operation of her engines, propelled ahead with great speed and headway causing the cable to tighten and spring up so as to strike the plaintiff."

The argument of appellant is based upon the theory that the only pull made upon the steel cable was by revolving the capstan. It is true this was the claim of defendant and its witnesses, but, as before stated, plaintiff claims, and there is testimony to support the claim, that the engines of the boat were started and there was no opportunity for the plaintiff to get out of danger. This raised an issue of fact which was properly submitted to the jury. See *Butterfield v. Arnold*, 131 Mich. 583 (92 N. W. 97); *King v. Railroad Co.*, 137 Mich. 487 (100 N. W. 783).

The second assignment of error is stated by counsel as follows:

"The plaintiff himself was guilty of negligence in going on the dock and between the warehouse and the dock while the operation of moving the large steel boat to the side of the dock by means of the cable was in progress. He had nothing to do there. His duties were on the boat, and did not begin until 12 o'clock, an hour or two later than the time of the accident. An effort was made to claim that he was in the employ of the defendant while on the dock idling there with a number of others, because when the line attached to the cable was thrown onto the dock the mate from the deck asked him to haul it up, and he did so. He did nothing else, and was not asked to do anything else.

He did not put the line onto the cleat or assist in doing it, and testified that he was not within 50 feet of the cleat at any time. He should not have remained between the warehouse and the dock and in a place of danger, and was clearly negligent in so doing."

An elaborate argument is made under this head in the printed brief by counsel for appellant.

On the part of the plaintiff it is said:

"There is no question of contributory negligence in the case, as it appears that the defendant had not elected to come within the provisions of Act No. 10, Public Acts of Michigan, Extra Session 1912, known as the compensation act, and said defendant, not having elected to come within the provisions of said act, lost its right to defend on the ground of contributory negligence."

Upon the oral argument in this court counsel for appellant stated that, if the plaintiff was in the employ of the defendant when the accident occurred, his argument under this head had no force. That question was left to the jury, who found, and there was testimony to support the finding, that plaintiff was in the employ of defendant when the accident occurred. This makes it unnecessary to discuss this phase of the case further.

We again quote from brief of counsel:

"Error was committed in the refusal to exclude plaintiff's testimony as to instructions as to his duties given him by Walsh, defendant's engineer, deceased at the time of the trial. * * * The statute (3 Comp. Laws, § 10212, as amended 1903, Act No. 30, p. 36), contains the provision that 'when any suit or proceeding is prosecuted or defended by any corporation, the opposite party, if examined as a witness in his own behalf, shall not be admitted to testify at all in relation to matter which, if true, must have been equally within the knowledge of a deceased officer or agent of the corporation, and not within the knowledge of any surviving officer or agent of the corporation.'"

Counsel for appellee meet this objection by saying:

First, that when the testimony was admitted it was not shown by the record that Mr. Walsh was dead; *second*, that he was not such an officer or agent as to bring the case within the statute; and, *third*, that the record does not disclose that the matter about which testimony was given was not within the knowledge of any surviving officer or agent of the corporation.

As we think the last point is well taken, we think it unnecessary to express any opinion upon the other two.

We again quote from the brief of counsel for appellant:

"The questions on cross-examination by plaintiff's counsel to Capt. Robertson, who was in charge of the boat at the time of the accident, as to accidents on former occasions caused by boats of which he had charge, were improper and prejudicial.

"These questions appear in the cross-examination of Capt. Robertson, called as a witness by defendant. He was asked whether, while he was on the Ann Arbor transfer boat (in 1901 or 1902), a man by the name of King was killed, also whether in June, 1902, when his boat was in the channel, he ran her into a skiff, and a man in the skiff was crushed and killed, and further questioned as to the circumstances and as to what the jury found. The impropriety and prejudicial effect of such questions as those in the presence of a jury is manifest, and the judgment should be reversed because of them, if for no other reason."

An examination of the record shows that defendant examined Capt. Robertson at great length as to length of his service and experience, presumably to show his capability as a vessel captain.

The questions to which exceptions are taken came out upon the cross-examination without interruption or objection from counsel, when the following occurred:

"Q. Well, the claim was made, wasn't it?

"A. I guess it was made; yes.

"Q. And the jury—

"Mr. Sprague (interrupting): I object to that as incompetent, irrelevant, and immaterial. Improper cross-examination.

"The Court: I am inclined to think it is prejudicial, Mr. Reilley. I sustain the objection.

"Mr. Reilley: Give me an exception."

It will be observed that the objection made by counsel for appellant was sustained and that the exception was taken by counsel for appellee. The situation does not call for discussion.

But one other group of assignments of error require discussion, though all the other assignments of error have been examined. We again quote from the brief of counsel:

"There was error in overruling the second ground of the motion for new trial that the verdict was excessive. The amount of the verdict was \$5,000, and there is nothing in the evidence which warrants any such award."

The plaintiff was but 34 years old. He was earning \$45 a month and upwards, and his board. There was testimony tending to show an injury that caused great pain and suffering and that at the time of the trial plaintiff had practically lost the use of one of his legs, and was compelled to use either a cane or a crutch constantly:

One of the doctors testified in part:

"All the muscles in the left leg seem affected. It amounts to partial paralysis. You can't swing the leg around for the different motions that he has in the other leg. It is my determination that he has partial paralysis of the left leg."

"There seems to be a loss of nerve conductivity in the leg. It fails to respond to electric stimuli, except pressure on the leg. If he presses anything he can feel that, but you put the battery on that and the muscles or nerves don't react, nor does he feel it, while on the other leg he does."

The trial judge had the great advantage of seeing

the physical condition of the plaintiff, and we are not inclined to reverse his action in overruling the motion for a new trial, based upon the claim of an excessive verdict.

Judgment is affirmed.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

WOLVERINE SPICE CO. v. FALLAS.

1. AMENDMENTS—PLEADING—TRIAL.

Under the statute of amendments, it was not error to permit plaintiff, in an action for breach of warranty, to amend his declaration on the day of trial by making the averments more specific. 3 Comp. Laws, § 10268 (5 How. Stat. [2d Ed.] § 12969).

2. APPEAL AND ERROR—EXCEPTIONS—SAVING QUESTIONS.

Objections and exceptions are essential to review, on appeal, the admissibility of evidence received at the trial of an action at law.

3. SALES—BREACH OF WARRANTY—EXPRESS WARRANTY—EXCLUDING IMPLIED—FITNESS OF MERCHANDISE.

An express warranty as to quality and method of packing preserved fruit did not exclude an implied warranty of fitness for use and consumption.¹

4. SAME—ACTIONS—DELAY.

Delay in commencing an action for breach of the implied

¹ On the question of the implied warranty of the fitness of articles of food, etc., bought for special purpose, see notes in 22 L. R. A. 195 and 15 L. R. A. (N. S.) 884.

warranty of fitness might be excused by testimony that the defect claimed to exist was not obvious and it required time to discover the existence of such unfitness.

Error to Kent; Brown, J. Submitted April 22, 1914.
(Docket No. 108.) Decided October 2, 1914.

Assumpsit by the Wolverine Spice Company against Edwin Fallas for breach of warranty. Defendant brings error. Affirmed.

R. M. Shivel, for appellant.

Taggart & Taggart, for appellee.

MOORE, J. Plaintiff is a manufacturer and jobber of baking supplies. Defendant operates a canning factory at Lowell, Michigan. This is an action to recover money paid by plaintiff to the defendant for 165 cases of canned apples manufactured by the defendant and sold to the plaintiff by him. From a judgment in favor of the plaintiff the case is brought here by writ of error.

It is the claim of the plaintiff that prior to November, 1911, it bought fruit of defendant and had trouble with it because of a bad process of canning; that it had decided not to buy any more fruit from Mr. Fallas until after a talk with him, in which he said he had discovered the trouble and had remedied it; that, relying upon this statement, the following paper was signed:

"EDWIN FALLAS CANNING AND CANMAKING FACTORY,
"CAPACITY 8,000 GALLONS PER DAY.

"LOWELL, MICH., Nov. 29, 1910.

"Edwin Fallas of Lowell, Michigan, has sold to Wolverine Spice Company of Grand Rapids, Michigan, 400 doz. No. 10 apples in sanitary cans, nice, bright stock, winter fruit and solid pack, at \$2.70 per doz. f. o. b. Lowell, Michigan.

"To be shipped locally as wanted or \$2.65 per doz. if at once in car lot.

"Terms:—60 day note or 1½ per cent. off in 10 days from above date.

"Swells guaranteed for 6 months from above date.

[Signed] "EDWIN FALLAS.

[Signed] "WOLVERINE SPICE COMPANY.

"A. D. PLUMB, Pres't."

It is the further claim of the plaintiff that after receiving some of these goods, several of the cans taken at random were inspected and seemed to be all right. Before the fruit was all delivered, defendant expressed the need of money and plaintiff paid him for the goods; that later, it is the claim, the taste of gasoline and rubber permeated the fruit so that the customers of plaintiff made complaint, which complaints were transmitted to defendant, and that he urged plaintiff to have its customers instructed to boil the fruit uncovered, when the bad taste would disappear; one of the defendant's letters, dated June 30, 1911, having the following language in it:

"I think if you would instruct your bakers to boil the apples in open kettles (no cover) that disagreeable odor, if any, would evaporate and disappear in the steam.

"Yours truly,

"EDWIN FALLAS."

It is the further claim that the customers of plaintiff insisted they were entitled to good fruit without the bad odor, and that plaintiff tried to settle with defendant and have him take back the fruit, or settle for it. These efforts proving abortive, this litigation followed, with the result already stated.

The defendant tried his case in the court below without counsel. After verdict and judgment in favor of the plaintiff, a lawyer was hired, who at once moved for a new trial. This motion was overruled, the trial judge filing reasons for doing so.

The first assignments of error relate to the allowance of an amendment to the declaration on the day

of the trial. By the amendment, somewhat general averments in the declaration were made more specific. No new or different cause of action was stated. Defendant did not suggest that he desired the case postponed because of this amendment, and the case was tried upon the merits. The course taken is justified by section 10268, 3 Comp. Laws (5 How. Stat. [2d Ed.] § 12969), and the many cases cited in the note.

A considerable portion of the brief of counsel is taken up with arguments of alleged errors in the admission of testimony. As nearly all this testimony was admitted without objection, and all of it without exceptions being taken, we decline to review its admissibility. *Conger v. Hall*, 158 Mich. 447 (122 N. W. 1073).

Two questions are presented by the record which require consideration. The first of these is so concisely stated by counsel in the brief that we quote from it:

"The testimony conclusively shows that there was a written contract of sale containing express warranties in this case. The plaintiff's case was based entirely on the theory that there was an implied warranty of fitness over and above the express warranty, and that there was a breach thereof. There was no breach of this express warranty. There were no swells. The fruit put up in the cans was good fruit, and it was solid pack. This written contract of sale containing the express warranty excludes any implied warranty. There being no breach of the express warranties, we maintain that the defendant was entitled to a directed verdict at the close of the plaintiff's case. *Hall v. Car Co.*, 168 Mich. 640 [135 N. W. 118]; *Monroe v. Hickox, Mull & Hill Co.*, 144 Mich. 30 [107 N. W. 719]. * * *

"In *Cook v. Darling*, 160 Mich. 475, at page 481 (125 N. W. 411), many of the goods sold were articles of food that were intended for family consumption. This court, speaking through STONE, J., said:

"It seems to be a well-settled doctrine in this State that where property is bought for a particular purpose, * * * and where articles are bought for consumption, * * * where there is not an express warranty, there is an implied warranty,

that the goods are fit for the purpose for which they were bought, and that articles of food are fit for consumption.' "

We think the logic of the argument is faulty. To illustrate: Would it be contended that if one made a contract for beef to be packed from the meat of steers four years old, if putrid meat was furnished there would be no defense to a suit for such meat, because the meat was from four-year old steers? To state such a claim is to answer it. We think counsel has misunderstood the decision in *Cook v. Darling*, *supra*, as will appear from the following language in the opinion:

"It is the claim of the defendant that these goods were sold with the express warranty that they were manufactured in compliance with the requirements of the food and drugs act of Congress (Act June 30, 1906, chap. 3915, 34 U. S. Stat., p. 768 [U. S. Comp. Stat. Supp. 1909, p. 1187]), and that they were produced with skill and care for the building up and holding of trade, and that there was a breach of this contract on the part of the plaintiff. Whether there was here an express warranty or not, the fact appears that many of the goods were articles of food, and all were intended for family consumption. It seems to be a well-settled doctrine in this State that where property is bought for a particular purpose, and only because of its supposed fitness for that, and where articles are bought for consumption, and the vendor sells them for that express purpose, the consequences of unsoundness are so dangerous to health and life and the failure of consideration is so complete that, where there is not an express warranty, there is an implied warranty that the goods are fit for the purpose for which they were bought, and that articles of food are fit for consumption. In such cases the vendor is held to a strict accountability. *Hoover v. Peters*, 18 Mich. 51; *Sinclair v. Hathaway*, 57 Mich. 60 (23 N. W. 459, 58 Am. Rep. 327); *Copas v. Provision Co.*, 73 Mich. 541 (41 N. W. 690); *Blodget v. Safe Co.*, 76 Mich. 538 (43 N. W. 451); *McCray Refrigerator, etc., Co. v. Woods & Zent*, 99 Mich. 269 (58 N. W. 320, 41 Am. St. Rep. 599); *Little v. G. E. Van Syckle & Co.*, 115 Mich. 480 (73 N. W. 554); *West Michigan Furniture Co. v. Glue Co.*, 127 Mich. 651 (87 N. W. 92)."

This language is germane in the case, and is decisive against the claim of appellant.

The other question demanding consideration is the claim that plaintiff delayed too long after knowledge came to him of the defect in the apples and is now estopped from claiming damages. We think this contention is met by the evidence that it took time to develop the defect, and that after it was called to the attention of the defendant, he urged plaintiff to have his customers remedy the defect by boiling the fruit in the open. This and all other testimony was submitted to the jury under proper instructions.

We find no reversible error.

Judgment is affirmed.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

DE GRAW *v.* SUPREME COURT, I. O. F.

INSURANCE—MUTUAL BENEFIT POLICY—FRATERNAL ASSOCIATIONS—
CONTRACTS—CONFLICT OF LAWS.

Plaintiff was wife of a member of defendant fraternal insurance association, who, during his lifetime, received a certificate of membership wherein he agreed that amendments might be made from time to time in relation to the constitution and laws of the order fixing the premiums and rate of assessments, and should become a part of the contract. The defendant association was organized under the laws of the Dominion of Canada. Fifteen years after the issuance of this certificate the defendant accepted a new charter from the parliament of Canada, changing the name of the association and authorizing it to make a charge or assessment against policies issued prior to 1899

and affecting the policy of decedent. The assessment was proportional to a valuation deficiency existing as to this class of policies, which were paying less than the cost of insurance. *Held*, that the charge or assessment was not against public policy, or contrary to the vested rights of insured.

Error to St. Clair; Tappan, J. Submitted April 28, 1914. (Docket No. 149.) Decided October 2, 1914.

Assumpsit by Emma De Graw against the supreme court of the Independent Order of Foresters upon a benefit certificate for a balance claimed to be due. Judgment for defendant. Plaintiff brings error. Affirmed.

P. H. Phillips, for appellant.

Stevenson, Carpenter, Butzel & Backus (*Elliott G. Stevenson* and *Thomas G. Long*, of counsel), for appellee.

MOORE, J. Suit was brought to recover a balance claimed to be due upon a certificate of insurance. The plaintiff was the wife of William J. De Graw, who died on the 7th day of October, 1913, and who was a member of the defendant. The certificate sued upon was executed September 23, 1898, in Toronto, Canada, following the receipt there of an application executed by the decedent, and was delivered to the decedent on September 23, 1898, in the State of Michigan. In the certificate of insurance appears the following:

"In consideration of the application for membership and of the agreements and statements therein contained; * * * and in consideration also of the provisions of the constitutions and laws enacted by the supreme court of the Independent Order of Foresters, and of any and all amendments thereto adopted from time to time by the said the supreme court, and in consideration also of the declarations and promises contained in the obligation taken by initiates in subordinate courts, * * * and upon the faith and

credit of all and each of which agreements, statements, promises, representations, provisions and declarations, and in consideration of the payment by the applicant at the times required, of any and of all the assessments, dues, fees, capitation tax and fines, required by the said constitutions and laws to be paid on account hereof, this benefit certificate is issued, * * * the supreme court of the Independent Order of Foresters agrees to pay and doth by these presents agree to pay."

At the time of the delivery of said certificate, and as a part thereof, decedent signed an agreement on the back thereof as follows:

"I agree that the constitution and laws enacted by the supreme court, Independent Order of Foresters, as well as any and all amendments thereto which may be adopted from time to time by the said supreme court, shall be a part of this contract—special reference being made by the parties hereto to the following sections of the constitution and laws, namely: Sections * * * 237, 238, 239. * * *"

The sections, the numbers of which are given, are the sections of the constitution and laws which prescribe the rates of assessments to be paid by members.

The trial court made the following findings, which are based on the record:

"Fourteenth. At the time the decedent became a member of the society, it was provided by the constitution and laws that the same might be amended, altered, or repealed as provided in the act of Parliament under which the society was then organized and existing, and also at a regularly convened session of the supreme court of the society, upon the affirmative vote of two-thirds of the votes cast in favor of any proposition submitted in due form.

"Fifteenth. The Parliament of Canada, on May 16, 1913, passed and adopted an act, entitled 'An act to consolidate and amend the act relating to the supreme court, Independent Order of Foresters, and to change its name to the "Independent Order of Foresters,"' copy of which is hereto attached as Exhibit D. Sections 3, 4 and 5 of chapter 100 of the Statutes of

1901, which are referred to in section 11 of said act of Parliament of May 16, 1913, are not material to a determination of the issues raised in this action.

"Sixteenth. The supreme court of the society was, in pursuance of section 12 of the act of Parliament last mentioned, duly and regularly convened in regular session within six months from the date of the passing of the said act, and at such session the following resolution was adopted by the supreme court on August 26, 1913: 'Moved by the supreme counsellor, seconded by all the members of the joint committee, and resolved, that the Independent Order of Foresters' Consolidated Act (being 2 & 3 Geo. V. [Canada] chapter 113) be and the same is hereby accepted by the supreme court of the Independent Order of Foresters.' Which after discussion was put to a yea and nay vote of the members of the supreme court and each and every member of said supreme court voted thereon and said resolution was adopted and said act accepted by the vote of 176 in favor of the same to 28 against the same, of which 28, 23 thereafter changed their votes and voted in favor of the same.

* * * * *

"Eighteenth. In pursuance of section 3 of the schedule of said act of Parliament, the assets of the society were determined, and it was found that the same, other than the present value of future premiums and dues and accumulated and future liens under the 1908 readjustment, that is, the value of all the property, real and personal, including securities belonging to the society, was \$20,559,911. Of this \$14,314,250 resulted from the assessments paid by members who joined the society on and after January 1, 1899, and \$6,245,661 resulted from assessments paid by the members who joined the society prior to January 1, 1899.

* * * * *

"A valuation deficiency existed as to the members who joined the society prior to January 1, 1899, and such deficiency was found to be \$25,555,448; that is, there existed a deficiency of such amount in the assets as compared with the society's liabilities on account of the benefits to be provided for on behalf of the

members who joined prior to January 1, 1899. Or, in other words, there should have been, and if such members had always paid proper and adequate rates there would have been, in hand to the credit of the members who joined prior to January 1, 1899, \$31,-801,109, instead of \$6,245,661. Such deficiency resulted solely from the inadequate rates theretofore paid by the members who joined the society prior to January 1, 1899.

* * * * *

"Twenty-third. In pursuance of section 4 of the schedule of the said act of Parliament, said supreme court at said regular session in 1913 levied or made a charge as an assessment against the mortuary benefit certificate of each member who joined prior to January 1, 1899, of a sum not exceeding its proportion of the valuation deficiency determined as aforesaid.

* * *

"Twenty-fourth. The charge made by said resolution against the certificate of the decedent whose age at his nearest birthday at the time of joining the society was 31 years was \$184. The same was not paid by decedent at the time it became due, and upon his death was, together with interest, deducted from the amount otherwise payable to his beneficiary. The decedent had paid all other assessments, dues, and charges and was in good standing at the time of his death.

"Twenty-fifth. A fraternal fund was established by the supreme court in pursuance of section 6 of the schedule of said act of Parliament. Out of this fund there was paid to the plaintiff, as beneficiary of the decedent under said certificate sued upon, the sum of \$50.

* * * * *

"Twenty-seventh. The amount paid by the society to the plaintiff as beneficiary under the certificate of decedent was \$865.86. The total deduction made from the face of said certificate was \$134.14."

The court found the deduction was a proper one, and rendered judgment in favor of defendant. The case is brought here by writ of error.

Counsel for appellant claiming, we quote from the brief:

"The questions raised are:

"*First.* Is the contract made with the plaintiff a Michigan or a Canadian contract?

"*Second.* Is the action taken by the defendant order in making the assessment against the certificate in question under the act of the Canadian Parliament binding upon members resident within this State?"

Counsel answers the first of these questions that it is a Michigan contract, and the second of them in the negative, and insists a judgment should have been rendered in favor of the plaintiff for the full amount withheld by defendant company, citing as conclusive in favor of the plaintiff the case of *Pokrefky v. Firemen's Fund Ass'n*, 121 Mich. 456 (80 N. W. 240); *Dolan v. Supreme Council, C. M. B. A.*, 152 Mich. 266 (116 N. W. 383, 16 L. R. A. [N. S.] 555, 15 Am. & Eng. Ann. Cas. 232), and many other authorities found in the brief. We do not think an answer to the questions above stated is necessarily decisive of the case, nor do we think the cases cited, especially the Michigan cases, are controlling in favor of the plaintiff, for an examination of them will show them to be distinguishable from the instant case.

In *Pokrefky v. Firemen's Fund Ass'n*, *supra*, it was held the trustees attempted to exercise a power not conferred upon them. The case was here again (131 Mich. 38 [90 N. W. 689, 96 N. W. 1057]), when it was held that whether or not the member of the association had assented to the change was a question for the jury.

In *Dolan v. Supreme Council, C. M. B. A.*, *supra*, it was held that the contract before the court was not against public policy, and it was also held that the new by-law did not apply to the existing contract.

In none of these cases is it held that a member might not agree in advance that the charter might be amended or by-laws be passed, that would have the effect of diminishing the amount of insurance.

Though the case is not on all fours, there is an interesting discussion of the principles involved in *Bissell v. Heath*, 98 Mich. 472 (57 N. W. 585).

The language used by Justice OSTRANDER in *Wine-land v. Maccabees of the World*, 148 Mich. 608 (112 N. W. 696), is pertinent here:

"In so far as arguments have been addressed to the point that the parties to a mutual benefit certificate may expressly agree to be bound by after-enacted by-laws, they are answered in favor of the validity of such contracts by a previous decision of this court (*Borgards v. Insurance Co.*, 79 Mich. 440 [44 N. W. 856]), and, we think, by the weight of authority (*Ross v. Modern Brotherhood of America*, 120 Iowa, 692 [95 N. W. 207]; *Supreme Commandery K. of G. R. v. Ainsworth*, 71 Ala. 436 [46 Am. Rep. 332]; *Beach v. Supreme Tent K. of M.*, 177 N. Y. 100, 105 [69 N. E. 281]; 1 Bacon on Benefit Societies and Life Insurance [3d Ed.], §§ 185-188). See collection of cases in note to *Supreme Council Am. L. of H. v. Champe* [127 Fed. 541], 63 C. C. A. 282. Such an agreement being found—and there can be no doubt that it was made in the present case—the effect of the particular by-law upon the particular member depends upon whether it was one which the association might lawfully make, whether it should be applied retroactively, whether it disturbs vested rights, whether it is reasonable. * * *

"Whether the changes with respect to assessments made in 1904, against which he protested, are within these powers remains to be considered. We have no doubt that it was lawful, and no violation of contract rights, for defendant to increase the number of assessments to meet the demands arising from the death of members. There seems to be no good reason why fewer assessments, at a greater rate, should not be levied, so long as the increase in rates is proportional; young and old members, alike, contributing. Whether such action be a mere detail in management aimed at procuring for distribution the same sum of money in a different way, or intended to actually increase the contributions over present necessities for distribution and to accumulate a fund, it may be, so

long as it is proportional and reasonable, supported, as against a protesting member, by his agreement in his application to conform to and be governed by laws to be from time to time made by the representative governing body of the association. While courts are not agreed upon this proposition, we are inclined to the views expressed in *Fullenwider v. Supreme Council R. L.*, 180 Ill. 621 (54 N. E. 485, 72 Am. St. Rep. 239); *Messer v. Grand Lodge A. O. U. W.*, 180 Mass. 321 (62 N. E. 252); *Reynolds v. Supreme Council R. A.*, 192 Mass. 150 (78 N. E. 129, 7 L. R. A. [N. S.] 1154, 7 Am. & Eng. Ann. Cas. 776); *Conner v. Supreme Commandery Golden Cross* [117 Tenn. 549], 97 S. W. 306. We agree with the court below that the increased assessments are not, in view of the conditions disclosed, unreasonable. Whether they evidence a departure from the statute purpose and plan of existence of such association is a question not presented."

It is clear that no one could tell to a certainty what the assessments in the future should be to make it possible for the defendant to pay the beneficiaries of its members definite sums of money. It is equally clear if it was selling insurance for less than it cost it would be only a question of time when it must go out of business. The record shows that it did insure those members joining prior to 1899, at a rate less than the cost of insurance. We do not think it was against public policy or an infringement upon vested rights for the insured to agree that such changes might be made in the laws of the association during his membership, as would enable it to carry out its insurance agreements.

The following cases are instructive and in point: *Fry v. Insurance Co. (C. C.)*, 31 Fed. 197; *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527 (3 Sup. Ct. 363).

Judgment is affirmed. •

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

WAIDELICH v. ANDROS.

1. NEGLIGENCE—LANDLORD AND TENANT.

In an action for negligent use of water and permitting the apparatus in a toilet room to overflow, injuring the goods of a tenant occupying the lower part of the same building with defendant, who leased the second floor, evidence tending to show improper use and carelessness in depositing foreign material in the closet, *held*, to raise an issue for the jury, and *held*, that the court erred in failing to consider the duty of defendant to employ care in the use of the apparatus which had overflowed at other times within his knowledge.

2. SAME—WATER SUPPLY.

While defendant was not an insurer, a high degree of care rested upon the tenants having control of the water supply in the upper part of a store building to employ active and constant precaution against the danger of an overflow.

3. SAME—EVIDENCE—TENANT'S DUTY AS TO WATER SUPPLY.

To make a *prima facie* case of defendant's negligence, it was incumbent upon plaintiff to prove an injury from an unusual occurrence of such a nature as to indicate defendant's negligence and such facts in relation to the occurrence indicating negligence as were reasonably in his power to establish.

4. SAME—RES IPSA LOQUITUR.

Plaintiff, whose declaration charged other negligence besides depositing foreign or bulky material in the bowl, was not deprived of his right to insist on the other negligent conduct so charged, by reason of attempting unsuccessfully to show the exact cause. Nor did he lose his right to base the claim of negligence on the presumption to which the accident gave rise of negligent conduct.

Error to Ingham; Collingwood, J. Submitted April 29, 1914. (Docket No. 178.) Decided October 2, 1914.

Case by John F. Waidelich against Alex Andros for negligently flooding plaintiff's premises. Judgment for

defendant on a directed verdict. Plaintiff brings error. Reversed.

Cummins, Nichols & Rhoads, for appellant.

Jason E. Nichols, for appellee.

STEERE, J. This writ of error brings under review the propriety of an order directing a verdict for defendant in an action tried before a jury in the circuit court of Ingham county, wherein plaintiff sought to recover for injury done to his stock of merchandise and fixtures by water escaping from plumbing located in defendant's apartments, on the floor above plaintiff's store.

Plaintiff and defendant were both tenants in a two-story, brick building designated as 203 Washington Avenue South, in the city of Lansing. The building was on the east side of the avenue, upon which it had a frontage of 21 feet, extending back that width 80 feet. It was equipped with modern conveniences, and was comparatively new, having been built four years previous by its owner, V. A. Lott, from whom these parties rented the separate stories independent of each other. Plaintiff rented and used the lower floor and basement for a shoe store, having a written lease. Defendant, who was in business elsewhere manufacturing candy, rented the second floor by an oral lease, and occupied the same as quarters for his employees. The ground entrances to the two stories were by separate doors and entirely distinct. Each tenant had exclusive access to, control and use of, his portion of the building; the entrance to the second story being by an inclosed stairway which began at a door upon which there was a lock, opening on the avenue and rising along the north wall of the building to a hall on the second floor. The rooms on that floor opened into this hall, at the back or east end of

which was located a water-closet, partitioned off, for the exclusive use of occupants of that floor,

On the night of March 26, 1913, and near the approach of morning, a policeman traversing his beat discovered water running out upon the sidewalk from under the front door of plaintiff's store, and at once aroused defendant's employees, who were sleeping above. It was found that water was overflowing from their closet and making its way into plaintiff's store below, where it could be heard dripping. They shut off the closet, and the policeman at once notified plaintiff at his residence, whence he immediately repaired to his store, which he found flooded, its contents being soaked and seriously damaged by water dripping through the ceiling from above. He at once cared for his damaged property as well as could be done.

Negligence of defendant is variously charged in three separate counts of plaintiff's declaration. Inattention, neglect, carelessness, and disregard of duty are charged, in failing to keep the closet in repair and in a condition reasonably fit and safe for use without injury to others; and active, negligent conduct and misuse of the closet, by putting newspaper and other improper things in it, which caused it to get out of order and clogged, and to overflow, uncared for until it invaded plaintiff's store and did the damage complained of. It is also alleged that defendant's employees, who were quartered there and left in charge, were ignorant and uninstructed as to the proper care and use of said closet, and were foreigners who did not talk the English language, for which reason they could not be made to understand by those capable of instructing them, as a result of which said closet was neglected and misused.

The trial court held that there was no evidence of probative force tending to establish the use of newspaper or other obstructing matter, as charged, and

that no *prima facie* case of negligence was proven, amongst other things saying:

"Now, the people who live in the upper stories of houses and use the plumbing are not insurers of the goods of the people below. If they are negligent, if they do something or omit to do something which they ought to have done which constitutes negligence, and by their negligence the people below are injured in their person or property, then the people who are injured may recover damages from the person whose negligence injured them. * * * The evidence in this case shows—I might almost say uncontradicted evidence shows—that the water flowed into the tank because the copper float was detached from the rod, the rod dropping down in the tank and opening the valve, the water then flowed into the tank, and, the outlet being insufficient, it overflowed the tank and came onto the floor. The only evidence to the contrary was that which was put in which tended to show that there was newspapers scattered about the closet; that there was newspaper on the edge of the bowl; that there was no evidence that the tank had overflowed by marks of water on the outside of the tank.

"Now, it has been shown that the overflowing of the tank was the overflowing of the copper tank inside of the wooden tank; that it never rose to the top of the wooden tank, and therefore never came over the edge of the tank, but flowed down between the copper tank and the wooden tank somewhere onto the floor. Mr. Andros cannot be held in damages unless he was negligent. Now assuming—and the plaintiff is entitled to the benefit of presumption, assuming the disputed point that Mr. Andros was obligated to take care of this closet—that Mr. Lott had passed it over to him and he must absolutely take care of it, there must be some evidence brought forward to show where Mr. Andros was negligent. * * * Now, I am not going to ask you to guess that newspaper was used, and that that newspaper when it was used stopped that closet."

At the conclusion of the charge the jury was di-

rected to, and did, return a "verdict of no cause of action."

The question here is not whether the court's conclusions as to how the accident occurred are sustained by the evidence, but whether plaintiff's testimony, considered in its most favorable light, raised an issue of fact under the allegations of negligence in his declaration. The declaration charges more than an improper use of newspaper. The first count charges a duty to care for and keep the closet in repair, and a failure of that duty in permitting it to get out of repair, and negligently allowing it to continue so and to overflow, thereby causing the damage complained of. That it did get out of order, was broken, and overflowed and damage resulted is undisputed. Plumbers and others who examined it the next morning found the float and ball cock, which shut off the water in the tank after use of the closet, were broken off. This allowed the intake to flow continuously, and, if the pipe for carrying off this flow was clogged or not of sufficient capacity, the water which otherwise would pass harmlessly into the sewer must overflow upon the floor, as it did.

Defendant claimed and introduced testimony tending to show that the breaking of the rod which held the float in the tank frequently occurred without negligence on the part of any one, and that the overflow or discharge pipe in the closet did not have sufficient capacity to carry away the water supplied by the intake pipe when constantly flowing, that the overflow was from the tank, and not from the bowl, and urged that neither the breaking of the float arm nor the resulting overflow of the tank implied negligence on the part of those in charge of and using the closet. The court evidently adopted this theory, and charged the jury, in substance, that no inference of negligence could be drawn from the accident or the facts shown

in that connection, overlooking, we think, the duty of diligent care which applies to such conditions and certain of plaintiff's testimony in that connection.

Defendant had used this closet over three years, and had ample opportunity to learn of any inherent defects. It had overflowed before, and complaints had been made to him. Plaintiff testified that when he endeavored to caution an employee about using newspaper in it he only replied that he could not understand, and said, "Go see Andros;" that when plaintiff saw and complained to Andros on several occasions he replied, "Go see Lott; Lott no fix." This involved a preliminary issue of fact in the case, which, owing to the turn the case took, was not reached. Defendant claimed that, under his lease from Lott, the owner of the building, it was the duty of the latter to keep the plumbing in repair, and defendant was under no responsibility in that respect. Lott testified that by the terms of the lease defendant took full possession of his part of the building, equipped with new plumbing in good condition, agreeing to pay the water tax, care for the plumbing, and keep the same in good condition. The questions presented here, however, rest on the assumption that defendant had exclusive possession and control of his floor, including the water-closet in it, which it was his duty to care for and keep in repair. The duty of vigilance and degree of care imposed is relatively contingent on the nature and known risks of the agency in hand.

"There is imposed upon a person who collects water in an artificial reservoir an obligation to use care 'proportioned to the danger of injury from the escape.'" *Scott v. Longwell*, 139 Mich. 12 (102 N. W. 230, 5 Am. & Eng. Ann. Cas. 679).

While not insurers, a high degree of care, proportionate to the known danger, rests upon those using and in control of an artificial water supply under

pressure in the upper stories of a building. The legal maxim which requires one to so use that which is his as not to injure others is particularly pertinent here. Defendant was supplied with and using an artificial, pent-up water course, elevated and susceptible of a swift flow, which he knew, or ought to have known, would, if released and uncontrolled, in a comparatively short time inflict serious damage to the building and its contents, and particularly to that directly beneath. His duty to guard against this and take all reasonable precautions to prevent it was active and constant. Plaintiff had no access to the floor where this closet was located, and was excluded from all knowledge of how it was cared for and used, except as *res ipsa loquitur* to him by flooding his establishment. The exact knowledge of what was done and how it happened rested, in the first instance, exclusively with defendant and his agents. In such a case the probative force of environment and circumstances must not be disregarded. The evidence of defendant's negligence need not be direct and positive.

To make a *prima facie* case of the defendant's negligence it was incumbent upon plaintiff to prove an injury from an unusual occurrence, of such a nature as to indicate defendant's negligence, and such facts in respect to the occurrence indicating negligence as were reasonably in his power. The rule is thus well stated in *Rosenfield v. Arrol*, 44 Minn. 395 (46 N. W. 768, 20 Am. St. Rep. 584):

"Negligence, which is the want or absence of ordinary care, is the gist of the action, and the burden was upon the plaintiffs to prove facts from which it could fairly be inferred that the defendant's negligence was the proximate cause of the injury. The evidence need not be direct and positive. The fact of negligence in any given case is susceptible of proof by evidence of circumstances bearing more or less directly upon the fact. The plaintiffs were not bound to prove more than enough to raise a fair presump-

tion of negligence on the part of the defendant, and of resulting injury to themselves. Having done this, they were entitled to recover, unless the defendant produced evidence sufficient to rebut this presumption. 1 Shear. & R. Neg. §§ 57, 58, and cases cited."

Plaintiff on his part introduced testimony tending to prove that defendant was in exclusive control and possession of the second floor and the water-closet there located, which was for the exclusive use of those occupying that floor; that defendant was responsible for the proper care and use of this closet and the water fixtures, which were new and in good condition when he took possession; that defendant's employees in charge and use of the closet were apparently ignorant of how to properly use and care for the same; that it had overflowed and caused trouble before, of which they and defendant, when appealed to, seemed indifferent and denied responsibility; that on the night in question part of the mechanism which automatically shut off the water was out of order and broken, and the occupants of that floor took no precautions in regard to it, though conditions indicated the water had been flowing for hours during that night. It was shown that but two weeks before this the closet did not work properly, and a plumber named Toolan was called to attend to it. He testified that he found a rag under the flush valve, and on its removal the closet worked all right, the pipes and tank being in good condition. Asked if the overflow pipe in the tank would take care of the overflow of the tank, he answered: "Sure; that is what they are meant for." He also testified that when he examined the closet after the accident, paper on the bowl indicated that the bowl itself had been overflowing.

It is urged in behalf of defendant that plaintiff has specifically charged and tried his case on "the theory that heavy, bulky paper and other solid matter was carelessly used by defendant or his tenants in the

bowl of the closet," causing the same to clog and overflow, which he has failed to prove; that, having pointed out what he claims was the exact cause of the accident, and unsuccessfully attempted to prove it, he is not at liberty to advance other theories or other claims of negligence.

The allegations in plaintiff's declaration are not limited to this single act of negligence. In *Cassady v. Railway Co.*, 184 Mass. 156 (68 N. E. 10, 63 L. R. A. 285), it is said:

"The real cause being shown, there is no occasion to inquire as to what the presumption would have been if the cause had not been shown. But if at the close of the evidence the cause does not clearly appear, or if there is a dispute as to what it is, then it is open to the plaintiff to argue upon the whole evidence, and the jury are justified in relying upon a presumption, unless they are satisfied that the cause has been shown to be inconsistent with it. An unsuccessful attempt to prove by direct evidence the precise cause does not estop the plaintiff from relying upon the presumptions applicable to it."

We think there was competent circumstantial evidence for the jury, even on the question of the negligent use of newspapers and other improper material. Witnesses who examined the closet the next morning testified that newspapers were lying on the floor around the bowl, that there were pieces of newspaper on the edge and sides of the bowl and there was no toilet paper, the place provided for it being empty.

We conclude this question, and others before referred to, were issues of fact for the jury to pass upon under proper instructions.

The judgment is reversed, and a new trial granted.

MICALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

BALES v. EVANS.

1. EVIDENCE—FRAUD—TRIAL—ISSUES.

Although broad latitude may be permitted in the introduction of evidence in support of the charge of fraud, relating to matters that may throw light upon the question at issue, and an elastic discretion must necessarily be granted to the trial court in ruling upon the testimony offered, clearly incompetent or prejudicial testimony is no more permissible in this class of cases than in any other.

2. TRIAL—MARRIAGE—ARGUMENT—CONDUCT OF COUNSEL.

In an action brought by a married woman for fraudulent representations which induced her to purchase a hotel, counsel for plaintiff did not commit reversible misconduct in referring to the fact that her husband had children by a former marriage, during his opening of the case to the jury.

3. SAME—INCOMPETENT EVIDENCE—WITNESSES.

Nor did the trial court err in declining to strike out testimony of the defendant, volunteered during his cross-examination, that he had run a "blind pig" in the hotel about 18 years before the trial, as too remote and irrelevant and immaterial; the witness proving to be unruly and evasive and the court ruling that the testimony could only be considered as affecting the credibility of the witness.

4. SAME.

It is the duty of the court to interfere, either upon objection being made or without waiting for objections, to prevent counsel from browbeating, intimidating, or insulting any witness.

5. SAME—WITNESSES—PRIVILEGE.

Where a witness has declined to answer a question on the ground of privilege, the jury may well be cautioned that they should not infer misconduct or criminality from the refusal, but should regard the same as failure of proof; counsel who argues to the jurors that the effect of such failure to answer amounts to an admission of guilt, commits reversible error.

Error to Allegan; Cross, J. Submitted April 28, 1914. (Docket No. 150.) Decided October 2, 1914.

Case by Elizabeth Bales against John Evans and another for fraud. Judgment for plaintiff. Defendants bring error. Reversed.

Edward J. Anderson, for appellants.

Clare E. Hoffman, for appellee.

STEERE, J. This action on the case was brought in the circuit court of Allegan county to recover damages claimed to have been sustained by plaintiff through misrepresentations of defendants whereby she was fraudulently induced to enter into a contract for the purchase of their hotel.

Defendants, who are husband and wife, owned and conducted a small hotel called the Junction House, located near the Lake Shore Railroad Station, in the city of Allegan. On February 5, 1913, plaintiff and her husband arrived in said city on the evening train from the West and went to the Junction House for the night. They were strangers in the city and had come from their former home in Iowa with the intention of renting a farm in the vicinity of Allegan, led to make the move through correspondence with a man named Littlejohn. In casual conversation between the parties, defendants learned the mission of their guests, and the talk which followed resulted in the latter contracting to buy the hotel for \$3,500 and plaintiff making a first payment of \$300 on the purchase price. The negotiations took definite form the following day, which was Saturday, and on Monday, February 8, 1913, the contract was signed, followed by the payment of \$300 by plaintiff. Plaintiff's claim, briefly stated, was that defendants, having learned the circumstances and purpose which brought her and her husband to Allegan, and that they were unac-

quainted there, began systematically to discourage them from their project, telling them there were no advantageous opportunities to rent or buy land in that vicinity, and that Littlejohn was dishonest, relating cases of his having defrauded people in land matters, etc., thus frightening them from consulting him; that defendants then made it known they were contemplating selling their hotel, owing to their health and other plausible reasons, and Mrs. Evans finally proposed that plaintiff buy it; that during the negotiations which followed defendants represented and falsely stated, in such manner as to then convince plaintiff, that their house was the best hotel in Allegan, bore a good reputation, was patronized by commercial travelers and the best class of the traveling public, had been run in a respectable and moral manner, and enjoyed a steady and profitable patronage, yielding a regular income of from \$5 to \$10 per day; that by such representations, which they believed and upon which they relied, plaintiff and her husband were induced to enter into said contract, and she to make the first payment as stated, without consulting others, Mr. Evans requesting her not to tell any one they had sold out; that she shortly thereafter took possession, and soon discovered that the representations, which induced her and her husband, were false and fraudulently made; that the house in fact bore an unsavory reputation, had been conducted rather as a rooming and assignation house than a reputable hotel, had no regular patronage by the respectable traveling public; that the income was inadequate, and the business even as previously conducted had been unprofitable, and the people who had resorted to and patronized the place were not, as a rule, respectable or of good repute; that upon learning such facts plaintiff took an assignment of his interest in the contract from her husband, who had paid noth-

ing upon the same, tendered an assignment of said contract and possession of the property to defendants, repudiated the agreement, and demanded back the money she paid, which was refused, whereupon she removed from the premises and began this action.

Defendants pleaded the general issue, denied any and all charges of misrepresentation, and claimed that the hotel had been conducted properly and profitably and bore a good reputation. The issue of misrepresentation and fraud thus raised was tried upon its merits before a jury, with abundance of bitterly conflicting testimony, and resulted in a verdict and judgment in plaintiff's favor for \$300 and interest.

Defendants' 29 assignments of error relate to rulings of the court in admission and rejection of testimony, the charge of the court, refusal to charge as requested, the opening statement and argument to the jury by plaintiff's counsel.

In the investigation of fraud it is said a broad latitude may be permitted in the introduction of evidence upon matters which may throw light upon the question at issue, and an elastic discretion must necessarily be left to the trial court within such range in guiding the course of the proceedings and ruling upon the many varying questions which exigencies of the case present, but clearly incompetent and prejudicial testimony or argument are no more permissible in this class of cases than any other. *Wessels v. Beeman*, 87 Mich. 481 (49 N. W. 483).

A careful reading of this record forces the conviction that numerous unseemly and intemperate things were permitted in the course of the trial, which should have been suppressed, though most of them are, under the conditions shown, such as to be regarded of that incidental class within the discretionary power of the court, with which appellate courts are loath to interfere except in distinct cases of abuse.

Certain of defendants' assignments of error are directed to such incidents, by which it is urged plaintiff's counsel continually brought before the jury prejudicial matter foreign to the issue, and thereby deprived defendants of a fair and impartial trial. We are impressed that such an atmosphere surrounded the case, and that both sides contributed to it.

Defendants' first assignment of error seriously urged arose from a portion of the opening statement of counsel, in which reference was made to children of plaintiff's husband. He was proceeding to narrate that, a day or two after the contract for the hotel was made, the husband went to Indiana after his children, to which counsel for defendants objected, and plaintiff's counsel said, "We will withdraw the children, wipe them out, consider they never existed," whereupon counsel for defendants said: "Trying to work a little sympathy on it. I object to it." After some further discussion the court told plaintiff's counsel to "Go ahead," and the latter then said, "I didn't care anything about it to begin with, but we don't propose to be interrupted all the time on something which is not material to the case." Having ruled it immaterial and stated he did not care anything special about it, counsel then, apparently because he did not "propose to be interrupted," proceeded to relate how her husband borrowed money of plaintiff and went to Indiana for his children. It is now claimed in plaintiff's brief that this was competent as bearing on the measure of damages; it being intended the children would become members of plaintiff's family in the hotel, and shown that they did return with their father for that purpose. While the propriety of this byplay might well be questioned, we think that in any view of the transaction the mention of plaintiff's stepchildren, who had no legal claim on her, would not be so prejudicial, standing alone, as to demand a reversal. It is not shown that they were

previously members of her family. She came from Iowa, and they were to come from Indiana. She had not lived with her husband after giving up the hotel contract, and when counsel asked if their marital relations were broken, she answered: "That is none of your business." The numerous cases cited by counsel in support of the contention that any reference to the children in a suit by the mother to recover damages for a tort to her is forbidden rest upon principles which have no application here, as an examination of the recent cases of *Johnson v. Grondin*, 170 Mich. 447 (136 N. W. 423), where previous decisions are reviewed, and *Rauhala v. Maki*, 172 Mich. 112 (137 N. W. 703), will disclose. In that class of cases the statute gives a separate right of action to the wife and children for the same wrong. To keep each distinct and preserve the rights of all in interest it is held that the case of the wife must be confined to her individual injuries, and the fact that she is the mother of children who might be dependent on her cannot be pressed upon the jury to swell her individual damages. The children mentioned here were not plaintiff's and had no claim on her.

An assignment of error urged and argued by defendants arises from interrogation of defendant John Evans, on cross-examination, as to his having violated the liquor law. He was asked:

"Q. Never was arrested and convicted for selling hard drinks?

"A. I defy you or any other man to ever find out where I ever sold any hard drinks in that house. Eighteen years ago I sold hard drinks and was pinched for running a blind pig in the old building, and pleaded guilty. Since then I have run my house straight."

His own counsel then moved to strike out this testimony, as to his being arrested, "on the ground that it is too remote, and as incompetent, irrelevant and

immaterial." The court denied the motion, stating, however, that it could only be considered as bearing on his credibility. We think this ruling was correct, and a wide range of inquiry particularly within the discretion of the court when such a witness is cross-examined. This witness was evasive, often irresponsible, reckless in declamation, and at times assumed to take charge and rule on the admission of evidence. He informed counsel who was cross-examining him:

"I don't care a darn for a judgment. It will do me no more good than a yellow dog. * * * You have got the wrong pig by the ear to fool around with me. I tell you that right now."

Interrogated as to certain alleged disorderly characters having stopped at his hotel, witness made impertinent personal retort with a wholly irrelevant assertion reflecting upon counsel. Being sharply questioned as to such volunteered assertion, he gave equivocal answers and finally admonished counsel to "never mind that." He was then asked, "Tell me what you know about that and how you came to make that statement," and answered, "That is far enough. Let us get down to business." Counsel was disposed to pursue this inquiry, but witness declined to be interrogated further and foreclosed the subject as follows: "I won't answer any more of those nonsensical questions." Whatever might be said, and could with propriety have been done in that connection, the court committed no error in refusing to strike out the volunteered testimony of this defendant as to his having run a "blind pig."

The right is inherent in the court to check and silence any witness or counsel who is going beyond reasonable and legitimate bounds in his method of testifying or examining, and "it is the plain duty of the court to interfere on objection, or without, when the attempt is made by counsel to browbeat, insult,

or to intimidate witnesses." 5 Jones' Commentaries on Evidence (Ed. 1914), § 815.

A witness named Jennie Davis was called by plaintiff, and examined touching her resorting to this hotel, and the conduct of certain persons who put up there. She was manifestly a reluctant witness, and denied staying at the hotel with a man named Clark, in answer to one of the first questions asked her. Counsel then said:

"I want to inform you—you realize you are under oath, do you? Do you realize that if you testify to an untruth here that you can be prosecuted for perjury?"

This witness was permitted to be rigidly cross-examined, by the counsel who called her, as to her conduct at the hotel and relations with men there. Her answers were sufficiently evasive, equivocal, and in denial that it was fairly within the discretion of the court to allow proper leading questions to be asked, on the ground that she was a reluctant and hostile witness. It would have been proper for the court, in its discretion, in view of the attack made by counsel calling her, to inform her of the constitutional right of a witness to decline to answer incriminating questions. No suggestion to that effect was made by any one, and her examination was apparently concluded when she was first excused from the witness stand. Counsel for plaintiff thereafter called a witness named Emma Marks, whom he also examined by leading questions, and who in an evasive manner, with many contradictions, testified in substance that she had personal knowledge of a certain man staying at the hotel with a woman who was not his wife, and whom she could not or would not identify. Being asked on cross-examination by defendants' counsel if she was not that woman, counsel for plaintiff interposed and said:

"Wait a minute. I ask that the witness be instructed that she don't need to answer that question as to whether it was her or not."

Being instructed by the court as to her right, the witness refused to answer, and when the subject was again approached in cross-examination, lest she forget, counsel would again interpose, "Wait a minute," and suggest that she again be advised. Counsel for defendants argued to the court that the witness, having disclosed part of the transaction, had waived her privilege, and moved that she be directed to answer, or, if not, that all her testimony relative to the unidentified woman be stricken out. These motions were both denied, and her refusals to answer, on suggestion of plaintiff's counsel, stood. Following this, plaintiff's counsel recalled Jennie Davis and asked:

"Q. I understand that you want to withdraw the answer to some questions that you made here before?"

"A. Yes, sir."

"Q. Now, I will ask you whether or not you know of any one man and woman occupying any of the rooms there at Evans' hotel who were not married to each other?"

To which witness replied, "I refuse to answer." In his closing argument to the jury one of the counsel for plaintiff commented upon this against objection, saying in part:

"Then when it was put up to her if she had ever stayed with another man, what does she say? 'I decline to answer,' and the judge asks her if she claims her constitutional privilege, and she does. What is the constitutional privilege?"

Counsel for defendant interposed an objection to any inferences being argued to the jury from the witness claiming her constitutional right, and plaintiff's counsel replied, "We will, though, unless the judge stops us." A ruling being asked, this argument was

allowed to continue and the changes were rung before the jury on the significance of "I refuse to answer." This error alone, irrespective of other questions as to those witnesses, entitles defendants to a new trial. If any reference to the witness' refusal to answer was made to the jury, it should have come from the court, with the caution that they could not infer misconduct or criminality on the part of a witness from such refusal to answer, but should regard it "as a failure of proof" as to such witness. *People v. Brewer*, 27 Mich. 134. Comment, or argument to the contrary by counsel to the jury, is prohibited. *Carne v. Litchfield*, 2 Mich. 340; *Knowles v. People*, 15 Mich. 408; *Foster v. People*, 18 Mich. 266; *People v. Maunusau*, 60 Mich. 15 (26 N. W. 797).

The judgment is reversed, and a new trial is granted.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

SOMERS v. FERRIS.

1. DEEDS—COMPETENCY OF GRANTOR—INTOXICATION.

Evidence tending to show that the grantor of certain real property was incapacitated by excessive use of intoxicants from entering into a valid contract of conveyance, considered as an issue of fact, and held, not sufficient to sustain a decree annulling the deeds.

2. SAME.

A drunkard is held incompetent to execute a conveyance only upon proof that at the time of the act, his under-

standing was clouded or his reason dethroned by actual intoxication.

3. SAME—INADEQUACY OF PRICE—EQUITY.

The court of equity will inquire into the inadequacy of price paid for land which was conveyed upwards of six years previously to the date of commencing suit, only so far as may be necessary to ascertain that the price paid was not so grossly inadequate as to shock the conscience and necessarily imply fraud.

4. SAME—CONTRACTS—LACHES.

Where complainant knew the facts in relation to his claim that certain conveyances were made when he was incapacitated from executing a valid deed, within a year after he conveyed the real property, but he took no steps to set aside the deeds within five years, during which time defendant expended large sums in clearing up the title and making improvements, the claim was barred by laches.

Appeal from Missaukee; Lamb, J. Submitted April 21, 1914. (Docket No. 98.) Decided October 2, 1914.

Bill by George Somers against Elbert C. Ferris and others for the cancellation of certain deeds. From a decree for complainant, defendants appeal. Reversed.

Gaffney, Miltner & Millington, for complainant.

Dan Youngs and Broomfield & Worcester, for defendant Ferris.

STEERE, J. This suit was instituted to obtain cancellation of two deeds executed by complainant, George Somers, purporting to convey to defendant Elbert C. Ferris 320 acres of land, located in Missaukee county, Mich. The grounds urged for such relief are want of consideration and fraud. Elbert C. Ferris is the active and chief defendant; the others named as defendants being his wife and certain parties holding mortgages on said land.

The bill of complaint asks for an accounting, an injunction to restrain cutting and removing timber from the premises, and a decree declaring null and void two described deeds from complainant to defendant, one of 160 acres in section 18, town 24 north, of range 6 west, dated May 4, 1906, and the other of two 80-acre tracts in sections 6 and 8, of the same town and range, dated January 15, 1907.

The substance of complainant's grievance, as stated in his bill, is that defendant Ferris contributed largely towards complainant developing into an habitual drunkard by furnishing and freely selling him intoxicating liquor, encouraging him to indulge his appetite for the same to excess, until his mind became weakened and his judgment impaired to the extent that he was easily misled and became a prey to any designing person; that when complainant had reached such condition, and while he was under the influence of liquor, Ferris, having previously obtained his confidence, fraudulently persuaded him to execute the conveyances in question for a grossly inadequate consideration.

At the time this suit was heard, complainant was 65 years of age. He had lived in Missaukee county for about 34 years, much of the time in Norwich township, where he first settled on emigrating to the county, with his wife, from his former home in Genesee county. He was then recently married to a second wife, having been divorced from the first. He stated that he then had practically no property and but \$1.50 in money. He secured and settled upon some wild land, which he engaged in clearing and cultivating, and later bought and sold stock, some of which he butchered, selling the meat to lumber camps. He appears to have at first been industrious and thrifty. For some years he prospered to a degree and came to be recognized as a man of some standing in

his community, having held school and township offices at various times. At the expiration of 19 or 20 years, he had developed a home farm of 80 acres, improved and mostly cleared, had accumulated some stock, teams, tools, etc., and secured, though not fully paid for, the 320 acres in question; but he had by that time also formed irregular habits, resulting in unsatisfactory domestic relations, and about 15 years prior to commencement of this suit he separated from his wife, after a private adjustment and division of property interests. He conveyed to her their 80-acre home farm, upon which there was a mortgage of \$700, and gave her some horses, cows, etc.; she releasing to him her dower interest in the remaining 320 acres, now in question. Thereafter he lived apart from his family, spending much of his time in a small village, not far away, named Stittsville, where he made his headquarters in a hotel with an auxiliary bar, run by a man named Dorrity. He had a house and some clearing on his 160-acre tract of land, which he called the Cole place, where he spent part of his time, at times did some farming, dealt in stock, teamed, and got out forest products. His intemperate habits became more pronounced as time went on, until, as he states, he spent half of his time at Stittsville "drinking whisky," especially after defendant came there.

In the spring of 1905, Ferris bought the Stittsville hotel and saloon from Dorrity, with it acquiring the patronage, society, and good will of Somers. Ferris took out a liquor dealer's license in May, 1905, and ran both the hotel and saloon business in his own name until May, 1906, when the license was taken for the ensuing year in the name of his son. The elder Ferris claimed to have sold the bar business to the latter, though he remained at and continued to run the hotel as before. There was apparently little change in the general management of the business as a whole, until October, 1906, when he leased the hotel

to a man named Haynes and quit the business. During Ferris' regency Somers is shown to have frequented the hotel bar and drank intoxicating liquors to excess, becoming more and more dissipated, often indulging in protracted sprees and becoming helplessly intoxicated. He made his headquarters and boarded much of the time at the hotel while defendant ran it, and was abundantly supplied with intoxicating liquors by both the elder and younger Ferris, whether drunk or sober, though defendant and his son claim to have often refused him, when he was intoxicated and had "got enough." Other testimony indicates that opinions of the critics waver as to how much was enough. He is shown to have frequently passed through all stages of intoxication at this saloon, his transition progressing unchecked from hilarious sociability and prodigal generosity, which temporarily attracted to him a following of loyal adherents, until it reached stupid drunkenness, to the entertainment and apparent envy of kindred spirits who were less successful in getting helplessly drunk, and who at that stage sometimes made him the victim of their coarse jokes. A neighboring farmer, named Hunt, was an associate and close rival in these excesses. Another neighbor, and acquaintance of 30 years' standing, who states complainant had been a common drunkard for the past 10 or 12 years, and that his faculties were somewhat impaired thereby, though even in 1906 and 1907 he was above the average in mental capacity when sober, sums up the situation by the statement, "Whisky led these two men to deteriorating about as low or lower than any two men in the community."

Four written instruments signed by Somers, which he claims were without adequate consideration and obtained by fraud at times when he was mentally incompetent, are involved in this controversy: The deed of the 160 acres dated May 4, 1906; an option

for the sale of his land dated November 2, 1906; a renewal of said option dated January 4, 1907; and the deed of the two 80-acre tracts dated January 15, 1907. The important questions for consideration are his mental condition when he executed those instruments, for it is undisputed that when sober and in his right mind he was bright, capable in business matters, and abundantly able to protect his own interests in any such transaction.

In portions of his testimony Somers states in variant language that during the period these transactions took place, his intellect was so weakened and impaired by long and excessive indulgence in intoxicating liquor that he had no realizing sense of what he was doing, nor distinct recollection of what took place, describing his then condition as "just negative," with his brain "ossified and congealed," and his memory faded to a point where he was only willing to venture a "guess" that he was then "drinking whisky," while in other portions of his testimony he discloses a keen recollection of the details of transactions he had either previously denied taking place at all or stated that he had no remembrance of them.

The deed of May 4, 1906, was, at the time of its execution, without consideration, having been given in furtherance of a scheme to perpetrate a fraud upon the township authorities. Ferris and Somers each testified that the other proposed the scheme. In the spring of 1906 Ferris found difficulty in getting acceptable bondsmen for his saloon business, and it was decided his son should apply for the license; he to qualify and act as his son's bondsman. To enable him to qualify as such, Somers and a neighboring farmer, named Pittz, agreed to and did each deed Ferris 160 acres of land, and a man named Freeman 40 acres more, with the understanding Ferris would deed the property back to the real owners when the bonds were approved. Somers, Pittz and Ferris together

drove over to Lake City, the county seat, where the deeds were prepared by and acknowledged before one of Somers' counsel in this case. On that day Somers refused to take a drink at the hotel with Pittz, saying he had to attend to some business and was going to keep sober. The evidence is conclusive that he did keep sober and fully understood the nature and purpose of the transaction. He testified on cross-examination that he knew what he was doing and executed the deed to Ferris so that he would have sufficient property in his name to qualify on his son's liquor bond.

The next instrument in the order of events, signed by Somers, was an option to Ferris for 45 days, dated November 2, 1907, authorizing him to, within that time, find a purchaser or himself buy the 320 acres in question at a price of \$1,950, with a 5 per cent. commission, whether he found a purchaser or bought it himself. Though Somers testified to the details of the transaction and said the option was read over to him at the time, he also stated that he could not remember whether he was drunk or sober when he signed it. It was prepared by an attorney named Gall, who, with a Mr. Heetebry, pastor of the Methodist Church at Stittsville, signed as a witness. Mr. Heetebry testified to witnessing the option; that he knew Somers well, was on friendly terms with him, had talked often with him both about religious and temporal affairs, had heard him say that he had made up his mind to sell his land in Missaukee county; that when the option was prepared the parties discussed it together and agreed on the terms; that Somers told Gall what to write, was "perfectly sober, had all his senses, and was in his right mind;" that he was a drinking man and drank often, but was bright, shrewd, and intelligent, and witness had known him to refuse to do any business while he was drinking.

At this time Ferris had leased the hotel and quit the saloon business, and claimed Somers was then owing him near \$1,100 for board, loans, bills paid for him, bar bills, etc.

On January 2, 1907, Somers was convicted before a justice of the peace of using indecent language in the presence of his daughter-in-law and sentenced to the county jail for a term of 90 days. The option he gave Ferris expired without anything being accomplished under it, and on January 4, 1907, Mr. Gall, for Ferris, visited Somers at the jail, with permission of the sheriff, and procured a renewal of the option. Somers unites with the sheriff in admitting that he was then perfectly sober and knew what he was signing and doing.

On January 8, 1907, Ferris visited Somers at the jail, with permission of the sheriff, whom he fully advised of his purpose, to obtain an adjustment or settlement of their accounts, and Somers, desiring to get some papers he had left at Stittsville before doing so, was allowed to go there for them in company with Ferris. They then went over their matters to some extent, but do not altogether agree as to what occurred. As a result of what passed between them, Somers signed a note to Ferris for \$800, and agreed to sign a deed of the land he had given an option for. Ferris claims his account, made up of various items for board at the hotel, care and board of horses, bills and notes paid for Somers, a bar bill, etc., amounted to \$1,100, which was figured up and agreed to, except the bar bill, amounting to nearly \$300, which Somers refused to pay, and that they finally settled on a balance of \$800, for which Somers signed a note. Somers denied that they reached any settlement at the jail, but admits that he signed the \$800 note, and on January 15, 1907, went, with permission of the sheriff, to the office of his attorneys of record

in this case, who were then attorneys for Ferris, where matters were gone over, and he signed the deed of that date for the two 80-acre tracts. This is the second of the two deeds to set aside which this bill is filed six years later. It is undisputed, and Somers admits, that he was perfectly sober at the time he executed this deed; no deed was then given for the other 160 acres included in the option, because the attorney, who made out the papers, advised that it was not necessary, as Somers had already conveyed the title by his deed of May 4, 1906, and under their agreement it would stand as a sufficient conveyance.

We think it clearly shown that on January 15, 1907, when this deed was signed in the office of reputable counsel, who took Somers' acknowledgment and now represent him, the accounts between these parties were all gone over, discussed, and settled, and the balance due Somers for the land, according to the price fixed in the option, paid into the hands of counsel for him. This money he admits was subsequently paid to and accepted by him. Somers testified that later some figures relating to the settlement were put down in his book in the attorneys' office. This book was produced and put in evidence. Of it he said:

"I thought there was more money coming to me than there was, and I wanted a statement put upon my book, in figures, as the settlement was made. * * * Yes, sir; these are the figures we put on the book. Mr. Miltner made the figures. I think Mr. Ferris and myself were present when they were made. I was there; I am sure of that. * * * These figures follow the settlement, and whatever is down there in figures is just as I and Mr. Ferris settled. For example, I supposed the \$197.79 for all taxes, that amount was to be taken out of the \$1,950. It was for tax titles and taxes that Mr. Ferris was to pay, and the item of \$364.05 was the item for the Torrey mortgage. Mr. Ferris was to pay that mortgage, and that amount was to be taken out of the \$1,950, and I think the item of \$226.50 was the amount of the

Kelly mortgage. Mr. Ferris was to assume that, and that amount was to be taken out of the \$1,950. I think that note was \$850. These figures were put down at my suggestion. I wanted Mr. Miltner to put down the figures just as the settlement was made, and he did that, and these figures represent the settlement just as it was made."

Even eliminating all other evidence in the case, it is impossible, in the light of his own testimony, to regard as of any probative force complainant's broad assertions in support of the allegations in his bill that at this time his brain was diseased, his mind gone; that he had no realization of what he was doing when he signed the \$800 note and the deeds; that he then owed defendant nothing, and the instruments were without consideration. None of the witnesses in this case on either side, except Somers himself, testify that when sober he was mentally incompetent or incapable of intelligently transacting business during this period, and most of them testify positively that when sober he was mentally competent, above the average farmer in shrewdness and business ability, and amply capable of understandingly transacting business. The testimony is conclusive that, when he executed these deeds, signed the option, and made this settlement, he was perfectly sober and fully understood what he was doing.

It is clearly shown that complainant had frequently drank to excess for several years, and that his excesses increased as he indulged his growing appetite for drink, until his business was almost totally neglected and he sank into a common drunkard. Though he sometimes patronized other saloons, the hotel bar at Stittsville was his favorite and habitual resort, not only while defendant ran it but before and after. That he was ruined by drink, morally and financially, is clearly shown, and as usual the bar-keeper was his friend while his money lasted. That

Ferris, while in the business, and for profit, made him welcome, indulged and encouraged him in his dissipation, and in that way contributed to his downfall, is equally manifest. If the issue here was one of comparative moral depravity, the preponderance of evidence as between the two would not be in his favor, but, in a proceeding of this kind, the court is not at liberty to act as a guardian to conserve the property of those disposed to squander it in dissipation. The question is whether these instruments, executed according to legal formalities and acknowledged before reputable attorneys, should be set aside because they were not executed by Somers when he was sober, sane, and competent to transact business understandingly. If he was competent, a court cannot concern itself whether he drove a good or bad bargain, or what he did or had done with his money.

A drunkard is held incompetent to execute a conveyance only upon proof that, "at the time of the act, his understanding was clouded, or his reason dethroned, by actual intoxication." *Wright v. Fisher*, 65 Mich. 275 (32 N. W. 605, 8 Am. St. Rep. 886).

Complainant's claim of inadequacy of price as proof of fraud is not well established by a preponderance of evidence. It is shown that in the intervening years the property has increased in value, both with the general increase in the price of land in that section and by substantial improvements which have been made upon it; but as applied to its market value when the option was given on November 2, 1906, though some witnesses testify to higher values than Ferris paid, other apparently disinterested witnesses, neighboring farmers living in that vicinity, lumbermen and land dealers who had bought and sold such land in that locality, to some of whom complainant had offered part of this land for less, testified to a then fair market value, estimating it by the acre and otherwise,

closely approximating the price stated in the option to Ferris.

Where the transaction was fully consummated years before, as here, the court will inquire no further into the adequacy of consideration than to ascertain if the price paid was so grossly inadequate as to shock the conscience and necessarily imply fraud. The evidence in this case does not establish that fact.

Complainant waited six years before electing to disaffirm the conveyances, and taking steps to have them set aside. Conceding the prejudicial significance of the fact that the settlement was obtained by Ferris, and the last steps taken in this transaction were when Somers was in jail serving a sentence for an offense committed while he was intoxicated, he was at least sober then and remained so until discharged the 2d of April thereafter. In excuse of his delay in bringing this suit, he testifies:

"Why, I had been drinking afterward, then finally began to realize what I had done and where my property had gone to, and then—I began to realize what had been done to me last summer some time. Yes, that was after I had stopped drinking and recovered my mental faculties to some extent."

It was shown that shortly after his discharge from jail, on April 2, 1907, he deeded this land to his son-in-law, Leonard Courter, without the latter's knowledge or consent, who, on being advised of the fact by one of Somers' present counsel, and at his suggestion, gave a quitclaim deed of the same to Ferris. Of his motive in making this conveyance, Somers says:

"I deeded the land to Mr. Courter, my son-in-law, because I got to thinking it over and concluded that he had taken advantage of me, and I believe I gave him the \$800 before that, too."

When asked on cross-examination if "last summer" was the first time he concluded he had been taken advantage of, he answered:

"No, I had thought of it ever since I gave that quitclaim deed to Mr. Courter. Yes, I knew of it all the time; just exactly what I knew when I filed this bill. I guess so. * * * I knew from January 15, 1907, up to the time I filed this bill on the 6th of October, 1912, that I had deeded the lands to Mr. Ferris, and I knew he was in possession of the lands."

No offer of restitution is shown to have been made in this case. Aside from the liquidation of his \$800 note, which he disputes, complainant knew Ferris paid a mortgage upon the land of \$364.05, together with taxes and tax titles approximating \$400, and he received \$309.16 in cash after he was released from jail, as well as seeing over \$500 expended in improvements upon the property. His act in quitclaiming to his son-in-law shortly after his deed to defendant Ferris, and his own admissions as to what he knew and thought, show a realizing sense at that time of all he claims now.

In *Sanderson v. Adams*, 133 Mich. 359 (94 N. W. 1063), where complainant sought to have set aside a conveyance made while in custody charged with the murder of her husband, terrorized by the situation and her mental capacity so impaired, as was claimed, that she was unable to act understandingly, and the conveyance therefore was not her free act and deed, this court said:

"On August 5, 1899, she was not in custody. * * * She * * * knew the fact (if fact it was) that that bargain was made when her state of mind deprived her of the capacity to make it. * * * If she had a right at this time to disaffirm the contract, she had a right to affirm it, and, when she accepted and appropriated its proceeds she made an election which for all time affirmed it."

In *Bumpus v. Bumpus*, 59 Mich. 95 (26 N. W. 410), it is said:

"The general rule is, where fraud is charged, that it must be clearly proved as alleged, and is not to be

lightly inferred, and the party affected by it must complain promptly when the facts come to his knowledge."

The fact, if it was a fact, that complainant had been defrauded, induced to make this settlement and sign the instruments at a time when his state of mind deprived him of the capacity to do so understandingly, came to his knowledge in April, 1907, according to his own testimony, and continued to be to his knowledge until he filed this bill, without offer of restitution, in October, 1912.

We are impelled to the conclusion that complainant was perfectly sober and in his right mind when he signed the instruments attacked, and is also precluded by laches from at this time questioning them.

For the reasons stated, the decree of the lower court must be reversed, and complainant's bill dismissed, with costs.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

LONGTON *v.* STEDMAN.

1. EASEMENT—DEEDS—CONSTRUCTION.

Where an easement was reserved by two deeds of conveyance, executed by the owner of an entire parcel to separate grantees, of adjoining portions of the land, about the same time, and where the right of way was used continuously by the grantees of both parcels for a numbers of years afterwards, the conveyances should be construed together to determine the intent of the grantors.

2. SAME—LIGHT AND AIR.

Complainants' predecessors in title reserved a right of way eight feet wide off the north side of the parcel granted and subsequently acquired by complainants. In the same instrument it was stipulated that the grantors would not erect or permit to be erected any buildings on the land north of complainants' parcel nearer than five feet to the line between the properties. Later the grantors conveyed the remaining parcel to defendants by mesne conveyances, in which the same right of way and building restriction was expressed. The 13-foot strip was used jointly for a right of way to reach a barn situated at the rear of the two parcels by the owners of both places for considerable time, and defendants finally constructed a building upon the land included in the building restriction. *Held*, that whether this restriction affecting the five-foot parcel was intended to preserve the right to light and air only or was intended to enable the complainants to use it with the eight-foot strip, the court of equity will protect the rights of the complainants.

3. INJUNCTION—EQUITY—PERMANENT STRUCTURE—ADEQUATE REMEDY AT LAW.

An injunction bill lies to restrain the erection of a permanent structure upon a right of way.¹

4. SAME—DAMAGES.

The fact that defendant's damages in removing a portion of the building would be large and complainants' loss or injury would be small, would not prevent the enforcement of the equitable remedy.

5. EQUITY—LACHES—ESTOPPEL.

No facts amounting to an estoppel or laches were presented by evidence showing that complainants had no knowledge that defendants were erecting a building on the easement, that as soon as they discovered the situation they demanded that it be removed, defendants having completed the structure in about two weeks.

6. SAME.

Mere delay and acquiescence are insufficient to defeat an equitable remedy based on a strict right, unless the acquiescence or failure to act has continued so long as to defeat the right itself.

¹ As to the right to mandatory injunction to compel removal of structure which encroaches on adjoining property, see note in 36 L. R. A. (N. S.) 402.

7. SAME—ACQUESCENCE.

Some act done upon the strength of delay or some right lost or claim relinquished is essential to estoppel arising from delay in enforcing a right.

Appeal from Kalamazoo; Knappen, J. Submitted April 21, 1914. (Docket No. 99.) Decided October 2, 1914.

Bill by William P. Longton and others against Henry H. Stedman and others for an injunction and other relief. From an order sustaining a demurrer to the bill of complaint, complainants appeal. Reversed.

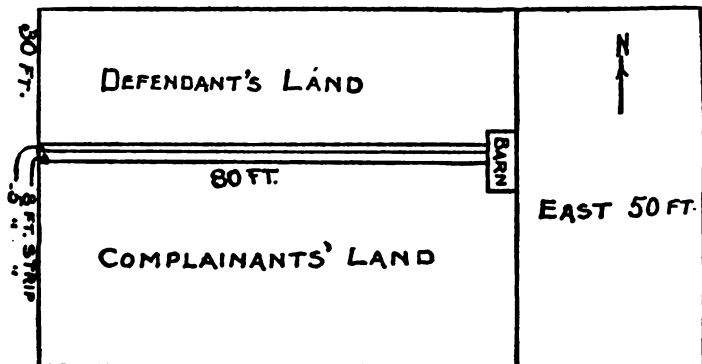
Charles L. Dibble, for complainants.

Alfred S. Frost and *D. O. French*, for defendants.

MCALVAY, C. J. This is an appeal by complainants from an order sustaining a demurrer of defendants and dismissing the bill of complaint. The facts stated in the bill of complaint necessary to the understanding of the questions involved, and which for the purposes of this case are accepted as true, are as follows: Complainants, husband and wife, are owners, as joint tenants, of part of a certain lot in the city of Kalamazoo, subject to a right of way, described as lot No. 308 of the original plat of the village (now city) of Kalamazoo, except the east 50 feet thereof, and also except 30 feet in width off the north side thereof, together with a certain easement, or right of way, over and upon the premises adjoining said lot upon the north. The dispute in this case arises with reference to this easement.

A plat of portions of the lot belonging to these parties, showing the location of this easement, is given.

The 30 feet on the north side of said lot excepted from complainants' deed is now owned by defendants. The easement runs east and west between the two properties. Both parties to this suit derived title to their respective parts of this lot through mesne conveyances from a common grantor. The only conveyances necessary to be mentioned are those which created the easement and right of way in controversy.



The portion of this lot now owned by complainants was conveyed by James Bauman and wife to Abraham Hanford, a grantor of complainants in the chain of title, by warranty deed on April 21, 1890, and is described as follows:

"Lot numbered 308 of the original plat of the village (now city) of Kalamazoo, as appears of record in the office of the register of deeds for the county of Kalamazoo, excepting and reserving from said description fifty (50) feet from and off the east end of said lot now owned by said first parties, and excepting also thirty (30) feet from and off the north side of said lot, together with a right of way eight (8) feet wide over the premises hereby conveyed, from the front to the rear of said lot just south of said thirty (30) feet. Said first parties also agree that they will not themselves, their heirs, executors, administrators, or assigns, erect or permit to be erected any building on the land next north of that herein conveyed nearer than five (5) feet of the north line

of the premises hereby conveyed, but this shall not interfere with buildings already on the back end of said premises, but is only intended to refer to that portion of the aforesaid thirty (30) feet in front of said buildings and now vacant, together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining."

The portion of said lot now owned and claimed by defendants was conveyed by warranty deed by said James Bauman and wife to defendants' grantors in chain of title on July 14, 1890, and is described as follows:

"Beginning at the northwest corner of lot No. 308 of the original plat of the village (now city) of Kalamazoo, according to the recorded plat thereof in the office of the register of deeds for the county of Kalamazoo, Michigan, running thence east on the north line of said lot to a point fifty (50) feet from the east end of said lot; thence south thirty (30) feet to the north line of land heretofore sold to Hanford; thence west along the line of said Hanford's land to the east line of Edwards street; thence north to the place of beginning. Also a right of way eight (8) feet wide from front to rear of said lot over the premises just south of the property herein conveyed (heretofore sold by said first parties to Hanford). Said right of way to be along the south line of the thirty (30) feet described herein. Provided said second parties, their heirs, administrators, or assigns, are not to erect any buildings on the front of said lot nearer than five (5) feet of the south line thereof."

Complainants aver that this easement and right of way 13 feet wide between the premises of the parties to this suit was created by these conveyances in April, 1890, and used continuously thereafter as such "by the owners of both lots as a right of way to the barn situated upon the east side of both parcels of land hereinbefore described, which barn was used in common by the occupants of said parcels of land." Complainant Anna Longton derived title to these premises as an heir and by deeds from all the other heirs of

Marinus Ampersee, owner in the chain of title, who died August 20, 1898, in possession of the same, of whose estate Edwin J. Phelps was appointed administrator. At this time the north 30 feet of this lot heretofore described was owned and occupied by a laundry company, which, during November, 1898, and while the said estate was in the course of administration, fraudulently proceeded without notice, and without any knowledge on the part of the administrator or the heirs, to trespass upon and obstruct said right of way and reserved strip, and to erect a building thereon in great haste, and completed said building within a period of two weeks. This brick building was placed upon the south line of the north 30 feet of this lot, covering the entire 5 feet of this easement and right of way existing therein, thereby depriving complainants of, and ousting them from, all rights therein.

The bill of complaint shows that at this time complainants were residents of the State of New York, and had no notice of any kind of the trespasses and wrongs committed and continued by the grantors of defendants. They aver that as soon as knowledge thereof came to them they immediately demanded the laundry company to remove said building, which demand was repeated, and that they have since repeatedly demanded that defendants and their grantors do the same, which requests and demands have been refused, and are still refused.

Complainants aver that this easement and right of way extended from the street line of the lot on the west toward the east along the line dividing these properties, a distance of 80 feet, to the barn referred to, which for years had been jointly occupied by the owners of both parcels of this lot. These properties are situated in the heart of the business district of Kalamazoo. The ground owned by defendants is alleged to be of the value of \$7,500, and that of com-

plainants of the value of \$10,000. The easement and right in controversy adds materially to the value of complainants' property and to the variety of uses to which it can be put of more than \$2,000. Briefly stated, the foregoing are the material facts set forth in the bill of complaint.

Complainants pray for a mandatory and permanent injunction that defendants be compelled and required to remove the building and obstruction to said right of way and easement, and for damages and general relief.

The record shows that after defendants demurred to the bill, and before a hearing was had, complainants asked and were permitted to amend the bill of complaint. Defendants then filed a second demurrer, which, upon the hearing, was overruled by the court and leave given to defendants to answer. About 30 days later the court, of its own motion, set aside the order overruling said demurrer, and entered an order sustaining the same and dismissing the bill of complaint. This is the order from which the appeal is taken by complainants. The demurrer to complainants' amended bill states 18 reasons why it should be dismissed. Such of these as require consideration will be considered.

Defendants raise no question as to the easement established and reserved in the deed to complainants' grantors over the north 8 feet of the land granted to them. They do deny that by the deed to their grantors any easement or right of way was granted to complainants and their grantors; that at most the restriction in that deed amounts merely to a building restriction. We have given the terms of the grant as set forth in the two conveyances which are relied upon to establish it. This lot No. 308 had been divided before any of the conveyances material to this cause were made. It appears from them that 50 feet

off from the east end of the lot had been disposed of to other parties, and that the portion of the lot west of said 50 feet was the only portion embraced in any of these deeds. The deed to complainants conveyed all of that portion of the lot west of this 50 feet, except 30 feet on the north side, and contained the following reservation:

"A right of way 8 feet wide over the premises hereby conveyed from the front to the rear of said lot just south of said 30 feet."

The deed then further recites:

"Said first parties also agree that they will not themselves, their heirs, executors, administrators, or assigns, erect or permit to be erected any building on the land next north of that herein conveyed nearer than 5 feet north of the north line of the premises hereby conveyed."

In the deed to defendants' grantor, which conveyed by metes and bounds, the north 30 feet of this lot was also included:

"A right of way 8 feet wide from front to rear of said lot over the premises just south of the property herein conveyed (heretofore sold by said parties to Hanford) said right of way to be along the south line of the 30 feet described herein."

With the following condition:

"Provided said second parties, their heirs, administrators, or assigns, are not to erect any buildings on the front of said lot nearer than 5 feet of the south line thereof."

These conveyances were made by the same grantors; the first in April, 1890, to complainants' predecessors in title; the second in July, 1890, to those of defendants. It is claimed on the part of defendants that a right of way was reserved from complainants' property, but that only a building restriction was created as to defendants' property. These instruments should be construed together. It is clearly

evident that it was the intention of the parties to both of them to create a right of way for the use of both grantees for the purpose of access by both to buildings in the rear of these premises. It remains to determine the extent and character of the easement. This may be found from the instruments themselves, from the practical construction given by these parties, and from the circumstances existing at the time.

The record shows that after these premises were conveyed to the respective parties occupying these descriptions of land they began and continued the joint use of this strip 13 feet wide for many years as a right of way to and from a barn which was situated 80 feet east of the street line, partly on each of these properties. There can be no dispute from the instruments themselves that a right of way 8 feet wide off from the north end of complainants' land was reserved for the use of the owners of both properties. It is also clear in both instruments that it was agreed that the south 5 feet alongside and north of this right of way was not to be built upon, and was to be forever left open and free. These strips made an alley 13 feet in width, with a clear intention of a joint enjoyment by the owners of the entire width.

Whether the agreement relative to the 5 feet be called part of a right of way or a building restriction is immaterial. Each of these parties was and is entitled to the use and enjoyment of the entire way left open. If the 5-foot strip was for the purpose of granting complainants light and air only, it was set apart in both deeds for the benefit of complainants, and belongs to them. It is clear that the rights of these adjoining owners were in the contemplation of this grantor at the time of making these conveyances and their acceptance, and that these conveyances created in each a substantial right in the strip set apart from the land of the other, which neither could enjoy to the exclusion of the other. Added to this is the

fact that both strips were used together by the grantors as a right of way. We cannot avoid the conclusion that the right sought by complainants to the use of this entire 13 feet in controversy created in them an easement and right which cannot lawfully be violated, and for the protection of which equity will grant relief. 5 Am. & Eng. Enc. Law (2d Ed.), pp. 9, 10, and cases cited.

It is contended by defendants that complainants have an adequate remedy at law. The violation of complainants' rights by the erection of a permanent structure obstructing an easement and right of way created by deed will be relieved by injunction in a court of equity. *Ives v. Edison*, 124 Mich. 402 (83 N. W. 120, 50 L. R. A. 134, 83 Am. St. Rep. 329); *Tolsma v. Scripps Corporation*, 153 Mich. 14 (116 N. W. 622).

It is also claimed that complainants are not entitled to recovery, by reason of the great expense and inconvenience such recovery would entail in removing the side wall and 5 feet off of the end walls of this building and the comparatively small injury to complainants. The facts appear to be that this building was used when built as a laundry, and is now used as a livery stable; that it was built in two weeks, and is a one-story brick shell roofed over; that it has a wooden floor, with a small office partitioned off in the front part with a wooden partition. The fact that it would be of great expense to the defendants compared with the injury to complainants, therefore, does not appear and is of no consequence, if it were true. The restrictions in the deeds have been violated. The amount of damages complainants have suffered is wholly immaterial. Such restrictions will be enforced. 3 Pomeroy's Equity Jurisprudence (2d Ed.), § 1342.

Defendants also contend that complainants have been guilty of laches, and further that the doctrine

of estoppel applies, and that upon both grounds the bill was properly dismissed. It appears that complainants had no knowledge of the erection of this building which covers the 5-foot strip of land in question, until after it was completed; that as soon as they discovered it, and repeatedly afterwards, they asserted their rights and demanded the removal of the building from such strip. No denial is made of the knowledge of defendants of the restrictions in their deed, but they urge the bare lapse of time and acquiescence to defeat complainants' right.

Complainants seek an injunction in support of a strict legal right. The great weight of the authorities supports the doctrine that in such case mere delay and acquiescence will not defeat the remedy, unless it has continued so long as to defeat the right itself. This rule has been announced by this court in several cases. *McConnell v. Rathbun*, 46 Mich. 303 (9 N. W. 426); *Koopman v. Blodgett*, 70 Mich. 610 (38 N. W. 649, 14 Am. St. Rep. 527); *Davis v. Township of Frankenlust*, 118 Mich. 494 (76 N. W. 1045). In these cases it appears that there were long delays after the cause of action arose, and this court held that the right of action was not barred by such delay.

Upon the question of estoppel there is nothing in the record to indicate that the delay in bringing suit was relied upon by the defendants or their grantors, or any act was done by them upon the strength of such delay, or that by reason thereof defendants will be compelled to surrender, forego, or alter what they or their grantors have done. These are essential elements to an estoppel, no one of which appears in the record in this case. The encroachment and trespass committed by defendants' grantors in unlawfully building this building in spite of the restriction contained in their deed, and thus depriving complainants of the easement granted them in the five feet of

land covered by the building was committed and the building completed without the knowledge or acquiescence of complainants, who from the time they became informed of the encroachment and obstruction erected by defendants' grantors to the time of commencement of suit repeatedly insisted upon their rights both to defendants and their grantors and demanded the removal of such building. There was therefore no acquiescence upon which to base an estoppel.

Defendants have had knowledge of complainants' rights in the premises, and by reason of this delay have been put to no extra expense, and, in case of an adverse decision, will be put to no more annoyance and expense than they would had the suit been brought by complainants immediately after the building was erected. There is therefore no merit in the claim that complainants were estopped.

The order and decree of the circuit court sustaining the demurrer and dismissing complainants' bill of complaint is reversed and set aside, with costs in favor of complainants, to be taxed.

A decree will be entered overruling such demurrer, with permission to the defendants to answer the bill of complaint within 15 days. The case will be remanded to the circuit court for further proceedings.

BROOKE, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

PRESTON v. PEOPLE'S SAVINGS BANK OF TRAVERSE CITY.

1. DAMAGES — BANKS — CERTIFIED CHECK — WRONGFUL DETENTION — INTEREST.

Where plaintiff sent to defendant a certified check for the purchase of defendant's claims against an insolvent lumber corporation, and stated in writing that it was given on condition that a receiver's sale of assets of the insolvent to plaintiff should be confirmed, plaintiff was entitled to the return of the check when the condition was not fulfilled, and, being required by the drawee to borrow enough money to cover the check, which defendant required to be paid, and being forced to pay interest on the loan during the time that the defendant wrongfully withheld the paper, the plaintiff should have been awarded a judgment for the loss so occasioned.

2. SAME—GOOD FAITH—EVIDENCE.

Testimony of the plaintiff that the State banking commissioner directed the drawee bank to charge the certified check to the account of the plaintiff, and that he borrowed sufficient funds to cover the check, and was obliged to pay interest on the loan for nearly two years, after he demanded the return thereof, sufficiently proved the payment in good faith of the money, and warranted a judgment for plaintiff of that amount.

Error to Grand Traverse; Mayne, J. Submitted April 17, 1914. (Docket No. 63.) Decided October 2, 1914.

Assumpsit by Thad B. Preston against the People's Savings Bank of Traverse City and others. Judgment for defendants. Plaintiff brings error. Reversed.

Nichols, Shaw & Eldred (F. C. Miller, of counsel), for appellant.

Parm C. Gilbert, for appellee People's Savings Bank.

MCALVAY, C. J. From a judgment rendered against plaintiff on a trial before the court without a jury in an action of assumpsit to recover certain interest claimed to be due plaintiff on the amount of a certain conditional certified check given by him to defendant, plaintiff has removed the case to this court by writ of error, asking for a reversal.

Many of the facts surrounding this case were before this court in the consideration of the case of *Preston v. National Bank of Ionia*, 169 Mich. 571 (135 N. W. 278), which involved another certified check given by plaintiff to that bank at the same time as the check in the instant case was given and under the same circumstances. The following are the material facts in the case: A lumber company at Traverse City became insolvent in 1907, and a receiver was appointed, who qualified and entered upon the duties of his office. By order of the court he offered for sale the assets of the insolvent corporation for which plaintiff offered a bid of \$66,906.78, April 1, 1909, and afterwards sent defendant the following letter:

“TRAVERSE CITY, April 10, 1909.

“PEOPLE’S SAVINGS BANK,

“Traverse City, Mich.

“Gentlemen:

“I will pay you fifty cents cash on the dollar for your present claims against the South Side Lumber Co. Payment to be made when the title to said property under receiver’s sale is confirmed in me by the court.

“Yours, etc.,

“T. B. PRESTON,

“By GEORGE E. NICHOLS, His Attorney.”

Upon which defendant indorsed the following acceptance:

“Accepted, provided a certified check for the amount due under the offer is deposited with this bank within five days from this date with the understand-

ing that in case you do not buy the property checks to be returned.

"PEOPLE'S SAVINGS BANK,
"By H. S. HULL, President."

On April 14th following, plaintiff wrote defendant as follows:

"IONIA, MICH., 4-14-09.

"PEOPLE'S SAVINGS BANK,
"Traverse City, Mich.

"Gentlemen:

"I am inclosing you herewith certified check for \$7,000 which is to be held by you and not used until the sale * * * is confirmed by the court and papers properly executed and transfers made to me.

"This is in purchase of your claim *vs.* South Side Lumber Company, which amounts approximately to \$14,000, and is subject to a revision of the amount whether it may be more or less than this amount—and if it be more, I am to pay you the additional amount, and if it be less, the amount is to be refunded to me. Please signify your acceptance of it and conditions covering it.

"Yours truly,
"T. B. PRESTON.

"Stenog 7.
"Inclosure."

The check which was inclosed, reads:

"IONIA, MICH., 4-14-09.

"STATE SAVINGS BANK:

"Pay to the order of T. B. Preston \$7,000.00, seven thousand dollars.

"STATE SAVINGS BANK BRANCH,
"Ionia, Mich.
"T. B. PRESTON."

Indorsed upon the face of said check appeared the following certification:

"Certified Apr. 14, 09. Good when properly indorsed.

"STATE SAVINGS BANK, IONIA, MICH.,
"A. J. HEMINGWAY, A. Cas."

It was indorsed on the back by plaintiff:

"Pay to People's Savings Bank, Traverse City, Mich., subject to terms of my letter of Apr. 14-09.

"T. B. PRESTON."

Defendant promptly acknowledged receipt of the letter and check, as follows:

"T. B. PRESTON,

"Ionia, Mich.

"*Dear Sir:*

"This bank has received your letter of the 14th inst., inclosing certified check for \$7,000 conditioned as stated in yours inclosing same.

"Very truly yours,

"M. O. ROBINSON, Cashier."

Later, after the sale to plaintiff was not confirmed, he wrote defendant the following letter, demanding a return of the certified check:

"IONIA, MICH., 7-9-09.

"PEOPLE'S SAVINGS BANK,

"Traverse City, Mich.

"*Gentlemen:*

"On the 14th of April, 1909, I sent you certified check for \$7,000 under the following conditions:

"To be held by you and not used until the sale of the entire property of the South Side Lumber Company was confirmed by the court, and the papers properly executed and transfer made to me. These conditions were in pursuance of an agreement made between us April 10, 1909, and this agreement was made in view of a bid I made for the properties and assets of the South Side Lumber Company of \$66,906.78, of which you had knowledge. The property of said company was struck off to me the 28th day of May and the court confirmed the sale the 5th day of June, but before title was conveyed to me by the receiver, the court, on application of certain creditors, vacated the whole matter and ordered resale and of all these matters you had notice.

"Therefore, by reason of the action of the court our negotiations are ended and the contract canceled and I therefore respectfully demand the return of the

certified check inasmuch as the provisions under which it was delivered to you have not been met.

"Kindly let me hear from you at once and oblige.

"Yours truly,

"T. B. PRESTON.

"Stenog. No. 7."

To which defendant replied as follows:

"July 14, 1909.

"T. B. PRESTON,

"Ionia, Mich.

"*Dear Sir:*

"This bank has received your letter of the 9th inst., relative to the South Side Lumber Co. deal and the same will be referred to the board of directors at an early meeting. I might say that our Mr. Hull will be home this week, as I am informed.

"Very truly yours,

"M. O. ROBINSON, Cashier."

Defendant did not return the check, but held it until August 18, 1910, and then sent it forward for collection. Upon presentation payment was refused by the bank of issue. It was then protested and such protest indorsed on the check, as follows:

"Protested for nonpayment, August 18, 1910. M. M. McGearry, Notary Public."

Defendant afterwards held this check without explanation or excuse until July 16, 1912, when it was returned to plaintiff by letter stating that it was returned under advice. The record shows that at the time this check was given plaintiff was vice president, director, and a stockholder of this bank, and also that later he became its president. It appears from his testimony that the certified check was not charged up to his account at the time of its issue, and was not so charged until July 30, 1910, when this was done under the direction of the State banking commissioner, who came to Ionia in regard to the matter and required that it should be charged to plaintiff's account. Plaintiff at that time borrowed \$7,000, the

amount of the certified check, on his individual note, bearing interest at the rate of 6 per cent., which amount was passed to his credit. This note was carried by him until April 27, 1912, and interest was paid thereon for that time. The sole question in this case is whether upon these facts the court should have rendered judgment in favor of plaintiff for interest.

The appellant contends that upon the undisputed facts in the case the court, as requested, should have entered a judgment in favor of plaintiff, either for interest on the amount of the certified check from the date demand was made by plaintiff for its return, as is shown by the letter to defendant, July 9, 1909, or from July 30, 1910, the date plaintiff was required to protect the certified check by making his account good by borrowing money from the bank for that amount when it was charged against him. The contention of defendant is that plaintiff and all of the officers of the bank were acquainted with all the facts, and that there was no need to borrow money and pay interest, for the reason that the conditions upon which the certified check was given were never complied with and, if required, a noninterest-bearing note or a bond could have been given by plaintiff to protect the bank. This contention is upon the theory that it was plaintiff's duty to occasion the least damage possible to defendant.

It is admitted on the part of plaintiff that the requirements of the banking law were not followed at the time this check was certified by the bank of issue. The claim is made that the record does not show the facts stated relative to the action of the banking commissioner, and therefore it is not for the consideration of the court. This was the view taken by the trial court. The testimony of plaintiff in the case is undisputed, and is as stated herein. Plaintiff was present and testifies clearly as to what occurred.

Defendant paid no attention to the request by plaintiff made in writing on July 9, 1909, for the return of this check, although receipt of such request was acknowledged. Defendant unlawfully kept this check in its possession for more than three years, during a large part of which time plaintiff paid interest on the money borrowed at the rate of 6 per cent., as required by the bank. That this interest was paid is not disputed. Plaintiff paid it upon a written obligation so to do. The fact that he was a stockholder and an officer of the bank, and that the bank itself, through its officers, had knowledge of all the facts relative to the check is immaterial to this issue. The bank had a right to require the payment of interest upon borrowed money. The court was in error in not finding, as requested, that plaintiff had paid this interest in good faith. The court was also in error in not finding and entering a judgment for the plaintiff in this case.

The only question to be considered upon that proposition is what the amount of such judgment should have been. Plaintiff suffered no actual loss, which can be considered in measuring damages in this case, until July 30, 1910, when he gave his note for \$7,000, with interest at the rate of 6 per cent., which he paid, until April 16, 1912, when the check was returned and he took up his note. This is a mere matter of computation and amounts to \$721. This is the amount of plaintiff's actual damages and the amount for which a judgment should have been entered in his favor in the court below.

The judgment of the circuit court is reversed, and the case will be remanded to the circuit court with directions to said court to enter a judgment in favor of plaintiff and against defendant for the above amount, together with costs of both courts to be taxed.

BROOKE, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

MICHIGAN TRUST CO. v. McNAMARA.

In re McNAMARA.

CONTEMPTS — VIOLATING INJUNCTION — EQUITY — EXECUTORS — ESTATES OF DECEDENTS.

Where a daughter of one of the heirs of a decedent attempted to interfere with the control of real property of the estate in the possession of the administrator, a trust company, which filed an injunction bill and secured a restraining order prohibiting respondent from trespassing upon the land or interfering with the tenants who leased the property from such administrator, and respondent thereafter claimed the right to ignore the injunction and tried to eject the persons occupying a portion of the land, of which the respondent claimed to have been in possession as agent of her father during a short period of time, the conviction of respondent for contempt of court was warranted, and a fine properly imposed, as the administrator claimed to have no knowledge of such alleged possession by respondent and she refused to recognize its authority or the jurisdiction of the court.

Appeal from the superior court of Grand Rapids; Stuart, J. Submitted April 20, 1914. (Docket No. 77.) Decided October 2, 1914.

Bridget McNamara was convicted of contempt of court and she appeals. Affirmed.

Bridget McNamara, in pro. per.

Thomas P. Bradfield (Kleinhans, Knappen & Uhl, of counsel), for appellee.

MCALVAY, C. J. This is an appeal from an order of conviction and sentence for contempt of court imposed upon defendant at the instance of complainant by the superior court of Grand Rapids. Complainant filed its bill of complaint in that court against defend-

ant, showing that it was and had been for more than a year theretofore in possession and control of certain land in the city of Grand Rapids as administrator of the estate of Mary McNamara, deceased, and that defendant, without any right, was interfering with such possession and control in various ways, and prayed for an injunction against defendant restraining her from trespassing upon said land or in any way interfering with it and with complainant's possession and control of the same. On the same day an injunction was issued in accordance with the prayer of the bill of complaint and a copy of the same was duly served upon defendant and return was made into court by a deputy sheriff of Kent county. Afterwards, complainant filed its petition in said cause, supported by affidavits showing that defendant had violated said injunction, and asking that an order issue to defendant to show cause why she should not be punished for contempt for such violation. The order to show cause was issued and duly served upon defendant. Other proceedings, not necessary to be stated in detail, followed in due course, which included an attachment against defendant, an answer by defendant to the order to show cause, interrogatories filed by complainant for defendant to answer, and defendant's answers to such interrogatories. A hearing of the matter was had before the court upon affidavits and testimony taken in open court, which resulted in the conviction and sentence of defendant, determining that she was not at the time of the service of the injunction on her, or at any time, in lawful possession, or in possession in any manner, either by her attorney, or otherwise, of the land described in said injunction, and that she had committed the acts of misconduct and contempt charged and alleged. The judgment and sentence concludes as follows:

"It is ordered and adjudged, and the court now here

doth hereby order and adjudge, that the said defendant, Bridget McNamara, is guilty of the said misconduct and contempt charged and alleged, and that the said misconduct and contempt was calculated to and did injure, impair, and prejudice the rights and equities of the complainant in this cause, and that a fine of \$10 be imposed on the said defendant, Bridget McNamara, for her said misconduct and contempt, and that she, the said Bridget McNamara, stand committed to the common jail of the county of Kent, there to remain charged with such contempt until the said fine be fully paid and satisfied, provided that such commitment shall not exceed 10 days."

This is the order and sentence from which defendant has appealed. No question as to remedy is presented. We, therefore, express no opinion upon that question.

In two early cases this court considered and determined contempts for violation of injunctions upon appeals from such orders. *Romeyn v. Caplis*, 17 Mich. 449; *Wilcox Silver Plate Co. v. Schimmel*, 59 Mich. 524 (26 N. W. 692). This conviction and judgment was based upon the findings and opinion of the court, which, for the purpose of a better understanding of the dispute in the case, is included in this opinion, as follows:

"The bill in this case was filed August 2, 1909, by the Michigan Trust Company, administrator of the estate of Mary McNamara, deceased, duly approved by the probate court for the county of Kent, to restrain the defendant from interfering with the complainant's possession of certain vacant lands comprising a portion of the estate of Mary McNamara, deceased, located near John Ball Park in the city of Grand Rapids. The bill asks that she be restrained from interfering with or annoying any of the tenants or lessees of the complainant, and from in any way interfering with the complainant's possession of the land or in any way trespassing upon the land, or in any way interfering with the land and from leasing or attempting to lease said land, and from interfering

with said land in any way whatsoever. The bill was sworn to and supported by an affidavit of a third party who was a tenant of the complainant and whose booth or refreshment stand upon said land had been partially demolished by the defendant.

"The vacant property belonging to the estate at one time consisted of about 40 acres, but June 28, 1908, or thereabouts, that part of the property lying west of Valley avenue, consisting of about 30 acres, was sold to the city of Grand Rapids by the complainant under the order of the probate court of Kent county.

"The Michigan Trust Company became special administrator of the estate of Mary McNamara about October 26, 1905, and since that time, either as special administrator or administrator, has had possession and control of the real estate above referred to. Until the portion west of Valley avenue was sold to the city in June, 1908, they rented the entire 40 acres from time to time to such circuses and other out-of-door entertainments as visited this city. The complainant knew nothing about any claim by the defendant to the possession or right of possession of said property until the day the bill of complaint was filed, when the defendant ordered one of the tenants of the complainant off of the land and threw down and demolished his partially erected booth.

"Upon the filing of the bill setting up these and other facts, the court issued an injunction restraining the defendant as requested by the bill, and the injunction was served on the defendant on the same day, viz., August 2, 1908. After being served with the subpoena, a copy of the bill and the injunction, the defendant apparently took no notice whatever of the injunction, but, if anything, became more active in her endeavor to oust the tenants of the complainant, and openly ridiculed the authority of this court to the sheriff of this court who served the injunction. When these matters were brought to the attention of the court, by affidavit, an order was issued requiring the defendant to show cause why she should not be punished for contempt, and this order, with the petition and affidavits upon which the order to show cause was based were served by the sheriff upon the defendant. The order required her to appear in court at 9:30

o'clock in the morning of August 3d. The defendant did not appear as required by the order to show cause. In fact the sheriff informed me that she stated when he served the order that she would attend to the injunction when she got good and ready, and that she was a British subject.

"After the time for her appearance in court had expired, it being apparent from her statements to the sheriff and her conduct that she did not intend to appear, I issued an attachment or warrant ordering the sheriff to bring the defendant before the court at 3 o'clock that afternoon, viz., August 3, 1909. When defendant appeared in court in the custody of the sheriff on the afternoon of August 3, 1909, she was not at that time represented by counsel, and I asked her whether she desired to retain an attorney. She stated her attorney was in Chicago, and she would have to send word to him; that she did not desire to employ any attorney in this city. I explained to her at some length her rights and duties and suggested that she get an attorney and prepare her answer to the order to show cause. She said she was a British subject, and that the court had no right to interfere with her. I explained that if the injunction was improperly issued I would be glad to set it aside and modify it as soon as she could show me it would be set aside, and I suggested an adjournment until she could prepare her answer. I asked her to promise to remain away from the property and not create any more disturbances there in the meantime. She positively refused to agree to remain away from the property. I told her I disliked very much to remand a woman to jail, and I tried to persuade her to promise to remain away temporarily at least. She replied she would take the jail. She asked that the matter be held open until her Chicago attorney could be present and I granted this permission.

"Two days later, the defendant having remained in jail in the meantime, on the 5th day of August, the defendant filed an answer to the order to show cause, and appeared by Ellis & Ellis of Grand Rapids at that time. This answer admitted the violation of the injunction, but claimed possession of the land by the defendant, and that on that account the defendant was not required to obey the injunction. As a result of

this hearing, I stated that I was willing, if either parties desired it, to go on with the matter and grant time for the filing of interrogatories, but I suggested that defendant had punished herself enough, and if no further disturbance was intended or committed, I was willing to let the matter rest, pending the filing of an answer and a hearing on the merits of the main case. At the same time, I explained to the defendant that she must not consider because she had been leniently dealt with that she could ignore the injunction and told her the injunction must be obeyed, or she must take steps to have it set aside in an orderly, regular way.

"No answer was filed by the defendant to the bill of complaint, and I was informed by the solicitor for the complainant that the defendant had left the State, and that he and the defendant's solicitors, Ellis & Ellis, had agreed, since no further trouble seemed probable, to let the contempt matter drop.

"No disturbances that were brought to the attention of the court occurred in the year 1910, but on June 14, 1911, the complainant again applied for an order to show cause why the defendant should not be punished for contempt because they were having trouble on account of booth and refreshment stand privileges for the Barnum & Bailey circus, which was to give two performances on June 15th, on the part of the land sold to the city and across the street from the part retained by the estate. An order to show cause was issued on June 14th, returnable forthwith, but this order was not served until the 31st day of July, 1911, at 6:30 o'clock in the forenoon. The sheriff who served the order personally informed the court of the manner in which the defendant received the order to show cause, and, it appearing to the court from the report of the sheriff that the defendant was wilfully refusing to appear and did not intend to appear and show cause, and it appearing from affidavits that she was wilfully violating the order of the court, I ordered her again brought before the court at 3 o'clock in the afternoon. When brought before the court on the 31st day of July, she asked that the matter be held open until Friday, August 4th, until her Chicago attorney could prepare her defense, and when she appeared in court on August 4th, on the order to

show cause, she asked that the matter be continued until August 9th. Both of these requests were granted. She was remanded on July 31st, to the custody of the sheriff unless she furnish a bond in the sum of \$1,000 for her appearance. The bond was not furnished; she stating she preferred to go to jail.

"Still another adjournment was granted at the request of the defendant. Finally, on August 14th, again by Ellis & Ellis of this city she filed a motion to quash the attachment, and the matter was argued on August 14th, by counsel for both parties. The motion to quash the attachment was denied on August 16th. An order was also entered on August 16th, releasing her from custody and extending the time to show cause until August 19th. On the 19th, defendant's answer to the order to show cause was filed, and on the 23d interrogatories were filed. On the 31st day of August, 1911, answers to the interrogatories were filed. The substance of her answer was that she, as attorney in fact for her father, one of the heirs of Mary McNamara, deceased, was in possession of the property at the time the injunction was served upon her, and therefore she was not required to obey an injunction or even notice it in any way.

"The wilful violation of the injunction alleged and set up in the affidavits filed by the complainant were admitted in the answer of the defendant, and in her answers to the interrogatories filed, and she denied that the trust company had any right in, or any possession of, the land. Time was given to the complainant to file counter affidavits to the answers of the defendant to the interrogatories. These were filed on September 22, 1911, and on November 2, 1911, the defendant filed further affidavits in her defense to the order to show cause. She has not appeared generally in the case by attorney or demanded a copy of the bill of complaint or answered the bill of complaint.

"On January 23, 1912, I made an order setting the contempt matter for argument on January 27th. On January 27th both parties appeared and the matter was fully argued and submitted. At this hearing certain files of the United States Circuit Court were offered in evidence, also an affidavit by Bridget McNamara stating that she never had a power of attorney of any

kind from her father, James McNamara, in regard to the estate of Mary McNamara, deceased. The substance of her defense seems to be that occasionally after the death of Mary McNamara, deceased, she induced certain persons to occupy a few square feet of this land, for a day or two at a time, as her tenants. Even if this is true, this occupancy was entirely unknown to the complainant, the Michigan Trust Company, and never, until the time the bill of complaint was filed, interfered in any way with their occupancy and possession or enjoyment of the land. It was not such a possession or occupancy by the defendant, even if it existed, as would entitle her to ignore the injunction of this court.

" * * * I am of the opinion that the defendant is guilty of contempt of this court and violating the injunction of this court, and I so hold, and that she should be punished for such violation. In determining the fine I again take into consideration, just as I did at the time of the first violation in 1909, the fact that she had already remained in the custody of the sheriff a number of days, also the facts that I am informed that she has now left the State and no longer makes any claim as attorney in fact for her father, or otherwise, and therefore further violation is improbable. I am of the opinion that defendant should pay a fine of \$10, and in default thereof that she be confined in the county jail until such fine is paid, and not to exceed 10 days."

All of the proceedings, as well as the evidence in the case, is returned in the record. The record sustains the conclusions of the learned judge.

The order of conviction and sentence is affirmed, with costs. The case will be remanded to the superior court of Grand Rapids for further proceedings.

BROOKE, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

BROWN v. KEISER.

1. HOMESTEAD—EXEMPTIONS—DEATH—CREDITORS.

The homestead of an unmarried man ceases to be exempt at his death: the statute creates such exemption only in favor of the widow or minor children of a decedent.

2. ESCROWS—CONVEYANCES—DELIVERY.

Evidence that decedent delivered a deed of his homestead to a third party to be delivered to the son of grantor; that no such instructions were given as to the length of time the deed was to be held; that although the witness understood the conveyance was to be delivered at the death of the father, and such intent was clearly to be inferred, no such instructions were specifically given; that the conveyance was made to induce the son to advance about \$120 to the father; and that the money was advanced, *held*, to be insufficient to satisfy the requirement of law that proof of the oral directions must be clear and convincing.

3. SAME—DEEDS—DEATH—FRAUDULENT CONVEYANCES.

By delivery of a deed in escrow to be surrendered to the grantee only after the decease of the grantor, a conveyance of the fee is accomplished, operating as of the date of delivery, the enjoyment being postponed until the grantor's death. But, in equity, such a legal fiction cannot be permitted to defeat just claims of creditors which arose before the second delivery of the escrow. BROOKE, KUHN, OSTRANDER, and BIRD, JJ., concurring on the ground that no delivery was proved and dissenting from the reasoning that if a delivery in escrow was effected, the conveyance should be set aside in favor of creditors.

4. SAME—DEBTOR AND CREDITOR—EQUITY.

But the decree, in a suit to set aside the deed as fraudulent, should have been so drawn as to permit the grantees in the deed to pay the claims against decedent, and costs, within a limited period, and not setting aside the transfer absolutely.

Appeal from Lapeer; Smith, J. Submitted January 21, 1914. (Docket No. 36.) Decided October 2, 1914.

Bill by Samuel D. Brown as administrator of the estate of William Keiser, deceased, against William F. Keiser and Jane S. Keiser to set aside a deed as a fraudulent conveyance. From a decree for complainant, defendants appeal. Modified and affirmed.

William E. Brown, for complainant.

B. F. Reed (*George B. Andrews*, of counsel), for defendants.

STEERE, J. In this suit defendants have appealed from a decree of the Lapeer county circuit court in chancery, setting aside a deed to them of certain premises, executed by complainant's decedent, and not recorded until some time subsequent to his demise, in order that the realty described in said conveyance may be reached by complainant, as administrator, and devoted, so far as necessary, to paying debts of deceased's estate.

The premises in question, described as N. $\frac{1}{2}$ of lots 9 and 10, block 22, in the N. E. division of the city of Lapeer, Mich., and conceded to be of the value of \$1,000, were purchased by William Keiser, decedent, in 1901. He was then a widower, and so remained until his death, which occurred September 29, 1908. Shortly after purchasing said property, he took possession thereof and resided upon it during the remainder of his life. When he died, and for some time prior thereto, his son and son's wife, William F. and Jane S. Keiser, defendants, resided with him. From the time of purchase, in 1901, until March, 1910, said premises stood upon the public records in the name of deceased. In February, 1910, no steps having been taken by relatives to liquidate the expenses of deceased's funeral and a few small debts which he had left, his creditors instituted proceedings in the probate court of Lapeer county for the settlement of his estate.

Complainant was appointed administrator. Debts amounting to \$210.49, including said funeral expenses, were proven and allowed against the estate. On March 7, 1910, the son, William F. Keiser, caused to be recorded a deed of the premises from deceased to himself and wife, bearing date April 8, 1908; the stated consideration being \$1.

Unable to find other assets belonging to the estate, complainant filed this bill to set aside said deed, alleging that the same was never delivered during the grantor's lifetime, and that he died seised of the premises described therein; that complainant and others had extended credit on the understanding and belief that the ownership of said real estate was as shown by the records; that no other assets of said estate were discoverable; that defendants refused to pay the debts of said estate, claiming to own said premises clear and free therefrom, and therefore complainant prayed that said deed be held void as against creditors and, if necessary, that said premises be ordered sold to satisfy their claims.

It appears, undisputed, that the deed in question was executed by deceased at his home on the date it bears and was, on the same day, left with the First National Bank of Lapeer, inclosed in an envelope, on which was indorsed a memorandum briefly describing the deed and stating that it was "to be delivered to grantees at the death of William Keiser, grantor."

The instrument was prepared by an old friend of deceased's, named J. H. Bidwell, who took the acknowledgment and acted as a witness. He made the indorsement on the envelope and delivered the deed, so inclosed and marked, at the bank, being accompanied there by defendant William F. Keiser. It there remained in custody of the bank until March 7, 1910, when said defendant procured and had it recorded following the institution of probate proceedings by

creditors of his father's estate. The circumstances of its execution indicate clearly the intent of deceased that the deed should not be delivered to the grantees during his lifetime. They were both present when it was executed, and he delivered it to Bidwell, not to them. What his further intentions in regard to it were is not so clear. There is no direct proof of any statement by him indicating that he did or did not intend to retain full control of it.

Of the witnesses present, only William F. Keiser and Bidwell testified to the transaction. Keiser related no conversation with his father or circumstances leading up to the execution of the deed, and briefly told of the occurrence as follows:

"Mr. Bidwell drew that deed, and I read it and handed it to my wife, and she read it and handed my father the deed, and father handed it to Jim (Bidwell) and said it was all right, and Jim put it in an envelope and wrote that stuff on there. I didn't know what was on it."

He also stated that he volunteered to go with Bidwell to the bank, "and the deed was left there."

Bidwell's account of the transaction was somewhat more full, he being recalled by the court, on its own motion, for further details, but his evidence was yet quite general and indefinite in many respects. He did not tell by whom he was instructed to prepare the deed, nor give the particulars of any conversation. He testified that he and deceased had been friends for years, and deceased used to go to him about many matters; that the deed was drawn up in his office, and he afterwards went with it to deceased's residence, where it was executed, he taking the acknowledgment and signing as a witness, but remained there but a short time; that he understood the son was letting his father have \$100, \$115, or \$120 to pay a note the father owed; that later he learned the money had been paid to a creditor of deceased; that he could not say

whether the deed was given for security or not, but he got the impression that, unless the deed was made, the money would not be forthcoming; that his understanding of the arrangement was the deed should be then taken to the bank, for the purpose of not having a delivery to William F. Keiser, and not to be delivered to the grantees until after the father's death, it being talked that it should be left in care of witness, who, however, suggested that, instead of his keeping said deed, it would be safer if left with the bank, which was acquiesced in; that, having received the instrument from the grantor after its execution, he first took it to his office and inclosed it in an envelope, upon which he wrote the memorandum before mentioned, then turned it over to the bank, without giving any special instructions, as he remembered, thinking the indorsement on the envelope would be sufficient; that no other consideration for the deed was mentioned in his presence nor anything said about the grantor keeping control of the instrument.

We need spend little time upon defendants' contention that the property was exempt from claims of deceased's creditors because it was his homestead. It ceased to be such when he went to his long home. He left no wife nor minor children to whom the privilege might be transmitted under the statute. The statute—

"Exempts the land only while it is occupied as a homestead by the widow and minor children. Subject to the homestead right, therefore, the lands are assets, when needed for the payment of demands against the estate." *Drake v. Kinsell*, 38 Mich. 232.

If the property belonged to deceased at the time of his death, it became an asset of his estate, holden for its debts as any other property might be.

It is the contention of defendants that the facts proven in this case show deceased delivered this deed to a third party as an escrow, reserving no control of

it, and with only the condition that it should be delivered to the grantees on his death, an event certain to happen sooner or later; that grantees having knowledge of and consenting to it, the delivery to the third party operated at once as a present, complete conveyance of the fee, free from all obligations of the grantor or his estate.

It is insisted by complainant that there was no legal delivery of this deed to or for defendants during deceased's lifetime; that it is not shown to have been delivered by deceased to Bidwell beyond recall, and that the strongest inference in defendant's favor to be drawn from the testimony is that, to recall it, the grantor would be required to repay the money it is claimed his son let him have on the strength of it; that even though it should be found the deed was delivered by the grantor as an escrow, beyond recall, to convey the fee and become operative on delivery to grantees at his death, whereby, as between the parties, the title might pass by relation at the time of the first delivery, it would not be effectual to cut off intervening rights of creditors of the estate.

Upon the question of delivery, we start with the general proposition that a deed is inoperative until delivered by the grantor and accepted by the grantee. It may be delivered to a third person for the benefit of the grantee, and when afterwards delivered to and accepted by the grantee it will, by the doctrine of relation, take effect from the date of the original delivery. Under these elementary rules, there are different classes of delivery through an intermediary, of varying legal significance, according to conditions imposed and the intent of the grantor as declared, or disclosed from the facts and circumstances shown.

The chief cause of uncertainty and resulting abundance of litigation on this subject arises from the accepted rule that in this class of cases the title may

rest for certain of its essentials on parol evidence. It is not required, as once indicated by early authorities, that all escrows, or conditional deliveries to third parties for ultimate delivery to grantees, must be evidenced by written instructions from the grantors (*Fulton v. Priddy*, 123 Mich. 298 [82 N. W. 65, 81 Am. St. Rep. 201]), and in this case defendants' title depends for one of its essentials on parol evidence, in many respects rather indefinite and inferential. We have no distinct statement by any one as to what the actual understanding and agreement between the parties was. The one of the grantees who testified told nothing of how this deed came to be made, briefly gave his version of what occurred at the time it was executed, and asserted the deed was his, and he paid for it. The grantor's mouth is closed by death.

The conveyancer did not know of any conversation between father and son previous to the time of the execution of the deed, stated he was not long there that morning, was not able to tell definitely what was said by any particular person or of distinct instructions given in relation to the deed which he carried away, but in general terms stated what he understood or inferred from what was talked, as he recollected it. From his testimony we can gather that the occasion for executing the deed was that the son let his father have some money with which to pay a debt; that in the transaction neither party was disposed to trust the other fully. The father would not trust the son with the deed, and, "unless the deed was made, the money wouldn't be forthcoming." Witness did not "recall that there was any conversation in regard to repayment of the loan," and he did not remember anything said as to whether or not the father might recall the deed, but understood the deed was to be delivered to the son at the death of the father, who desired witness to care for it, but consented, on witness' suggestion, that he might leave it with the bank.

Witness thereafter, without any more definite instructions from deceased, wrote the indorsement on the envelope and left the instrument with the bank as before stated, and, so far as shown, without telling deceased of the indorsement or obtaining any ratification of what had been done. Bidwell nowhere testified that the grantor delivered the deed to him, or any other third party, with instructions to deliver it to grantees at grantor's death. The farthest he went in disclosing the expressed intent or desire of the grantor was the statement that deceased suggested it be left with witness, and when directly asked by the court if deceased said anything as to how long witness should keep it, or when deliver it to the son, he replied:

"I don't remember now what he said in that matter. * * * I can't recall the conversation."

The son, the only other witness, goes no farther than to state that his father said the deed was all right, and "handed it to Jim." Bidwell nowhere directly traces to the father the source of his understanding that the deed should be delivered to the son upon the death of the father.

Not only must the delivery, by grantor to a third party be proven, but also the definite instructions by him to deliver after death to the grantees. The validity of title to real estate, which defendants seek to maintain to defeat creditors of this estate, depends upon oral proof to sustain this proposition. It should be unequivocal, clear, and convincing proof. We are not well satisfied that the trial court should have found that it was.

Conceding, as defendants so strenuously insist, that it is affirmatively established by the proofs that grantor did deliver this deed to a third party, with instructions to deliver it to grantees on his death, and with the intent that it should thereafter be beyond his control or power to recall, we need spend no time

with the numerous authorities cited upon the question of whether title passed before the second delivery and its effect as a deed between the parties at the date of the execution. That question is at rest in this court. The most emphatic utterance, perhaps, being found in *Meech v. Wilder*, 130 Mich. 29 (89 N. W. 556), wherein it is said:

"It is the well-established rule in this State that the delivery of a deed by a grantor to a third party, to be by him delivered to the grantee after the grantor's death, is valid. It conveys the fee, and operates as a conveyance *in præsenti*, though the enjoyment is postponed until the grantor's death."

It is insisted that in such cases there can be no occasion to apply the doctrine of relation back to the first from the final and actual delivery to the grantee, because the fee was conveyed at the time of the first delivery. Whatever technical distinction may be discovered, as bearing upon passage of title by conveyance and testamentary disposition, the rule must rest upon the same principle of legal fiction.

This deed was executed April 8, 1908; the grantor died September 29, 1908; and the deed was first actually delivered by the bank to defendants as a physical fact on March 7, 1910. Whatever delivery is recognized as made to grantees before that time is a legal fiction, and, if distinguishable from the doctrine of relation, it is a distinction without more than an extremely technical difference.

As between grantor and grantee and those in privity with them, it may, by legal fiction, be held that the delivery to a third party for subsequent delivery to the grantee, who assents, operates as a full and complete delivery, but as is said in *Hibberd v. Smith*, 67 Cal. 547 (4 Pac. 473, 8 Pac. 46, 56 Am. Rep. 726):

"The assent can get back to the date of delivery to the stranger only by virtue of the doctrine of relation, which is a fiction of law in which there is

always equity, never working an injury, and which is never permitted or applied so as to do wrong to third persons"—citing many authorities.

The decisions of this State fully recognize the principle. *Heffron v. Flanigan*, 37 Mich. 274; *Flint, etc., R. Co. v. Gordon*, 41 Mich. 420 (2 N. W. 648); *Taft v. Taft*, 59 Mich. 185 (26 N. W. 426, 60 Am. Rep. 291).

These few claims of creditors, consisting chiefly of the cost of burying the dead and necessities for the household, were existing, intermediate liens against the estate long before the second delivery of this deed, and the fiction of the first cannot be permitted to work a wrong by defeating them.

That the equities of the case are strongly in complainant's favor is clear. The deceased is indicated to have incurred few obligations and been solicitous to care for his debts. After the father's death, the son represented that the father owned this property, and directed that the funeral expenses be charged to the estate. While he has denied making this representation, he admitted promising to pay the debts, and gave the excuse for not doing so that threats of these proceedings prevented him from using this property to secure the means. When asked why he could not as well arrange it with complainant, who he admitted offered to take security on the property, he replied, "That is all right, but wouldn't do it." His own equivocal and contradictory testimony emphasizes lack of equities for the defense. He is seeking to maintain title to all his father had, and avoid even paying for the coffin he was buried in.

It is urged that equities cannot affect the legal questions involved in this litigation, and in no event could the misconduct of the son affect the rights of his wife, also a grantee named in the deed. She did not appear as a witness, and her attitude is not declared, except

by her joint answer with her husband. As to the strictly legal questions involved, this contention is true; neither could what was said and done by him strengthen or weaken the legal status of prior creditors, but what he said and did is competent to consider as bearing upon his credibility as a witness and his understanding relative to delivery and acceptance of the deed prior to his father's death.

The decree of the lower court set the deed aside absolutely as to all parties. Complainant is only interested to the extent of the proven debts of the estate, which amount to but a fraction of the value of the property. The decree should be modified to allow defendants to satisfy the same by payment of claims and costs within a reasonable time, in harmony with the rule declared in *Reed v. Jourdan*, 109 Mich. 128 (66 N. W. 947), and *Chapoton v. Prentis*, 144 Mich. 283 (107 N. W. 879).

With such modification, the decree is affirmed, with costs.

MCALVAY, C. J., and STONE and MOORE, JJ., concurred with STEERE, J.

OSTRANDER, J. I concur in the result announced in the opinion of Mr. Justice STEERE, upon the ground that the testimony fails to establish a delivery of the deed, in escrow, by the grantor. If the delivery was established, then, in my opinion, a different conclusion and result would be inevitable. I do not concur in that portion of the opinion which proceeds upon the assumption that the deed was delivered in escrow.

BROOKE, KUHN, and BIRD, JJ., concurred with OSTRANDER, J.

BULLOCK v. WARD.

INTOXICATING LIQUORS — WARRANT — SEARCH AND SEIZURE ACT — SHERIFFS.

Under section 29 of Act No. 107, Pub. Acts 1909 (2 How. Stat. [2d Ed.] § 5044), wherein the requisites are set forth for issuance of search warrants, authorizing the seizure of intoxicating liquors unlawfully stored and concealed, an affidavit for such warrant, which does not allege in the language of the statute that the liquors are concealed in the place named therein, does not comply with the law, and the warrant afforded no protection to the sheriff in seizing liquors which were stored for sale in a county that had adopted prohibition.

Error to Montcalm; Davis, J. Submitted April 28, 1914. (Docket No. 153.) Decided October 2, 1914.

Trover by Julian W. Bullock against Alphonsus E. Ward and others for the conversion of certain intoxicating liquors. Judgment for plaintiff for less than his claim and he brings error. Reversed.

R. A. Hawley, for appellant.

L. C. Palmer, for appellees.

MCALVAY, C. J. Plaintiff in this suit upon a writ of error asks this court to review and set aside a certain judgment entered upon a verdict directed in part against him in an action of trover brought by him against defendants. The facts in the case are as follows:

Defendant Ward, at the time of the taking and conversion of plaintiff's property, was sheriff of Montcalm county. The other defendants were his deputy sheriffs. Plaintiff was a registered druggist and pharmacist engaged in that business in the village of

Fenwick, Montcalm county. He had given no bond for the sale of liquor as a druggist on May 1, 1911, and did not give such bond until July of that year. On May 19, 1911, at an early hour in the morning, the deputy sheriffs above named, acting under orders and directions of Sheriff Ward, who placed in their hands a search and seizure warrant, made a search of plaintiff's premises in Fenwick, and seized and took away therefrom a large quantity of his property, being liquors with the receptacles containing them, of the claimed value of \$284.

At the close of the proofs in the case, the trial court directed the jury to return a verdict in favor of plaintiff for the value of certain liquors and property taken by defendants, not described in the search warrant, to the amount of \$29.45, and found defendants not guilty of the unlawful taking and detention of the other property mentioned and described in the declaration. The search and seizure proceedings had in this case were intended to be those provided for by what is known as the local option law of this State, and the questions raised upon the errors assigned by plaintiff challenged the validity of the complaint and warrant under which the officers justified the seizure of plaintiff's property.

Plaintiff contended in the court below, and now contends, that:

"The complaint and affidavit made for the purpose of obtaining the search and seizure warrant involved in this cause conferred no authority or jurisdiction upon the magistrate to issue such a warrant in that it did not set forth the statutory requisites."

We notice that defendants insist this question was not raised in the court below. Our examination of the record shows that counsel is mistaken. Early in the case counsel for plaintiffs stated to the court:

"The entire claim before the court is this: Have

we a valid statute in this State authorizing the issuance of seizure warrants? If we have, does this paper, that was issued under that statute valid upon its face, disclose no legal defects upon the face of it? If it does, they had a right to seize them."

And again, at the close of the proofs, plaintiff's counsel made a motion for a directed verdict and, among other reasons given at the time, said:

"We assert this search warrant was not a legal process and would not operate as a justification for the reasons, as follows: * * * It isn't stated, as I have already referred to, that affiant believes, or has good cause to believe, that such liquor is there on the premises concealed."

This was understood by the learned trial judge, who, in denying plaintiff's motion, among other things, said:

"The complaint itself in this case is within the statute. The warrant for search and seizure in this case is fair upon its face, so much so as would authorize the sheriff to act as he did."

The following is a copy of the search and seizure warrant upon which the property of plaintiff was seized and taken away by defendants:

"STATE OF MICHIGAN,

"County of Montcalm—ss.:

"To GEORGE D. BOGART, Deputy Sheriff of Said County
—Greeting:

"Whereas, there has been filed with the undersigned an affidavit of which the following is a true copy, to wit:

"STATE OF MICHIGAN,

"County of Montcalm—ss.:

"The sworn complaint and affidavit of Frank Cole of Fairplains Township in said county, made and taken before me, William A. Briggs, a justice of the peace of the city of Stanton, in said county, upon the 18th day of May, A. D. 1911, who, being duly sworn, says that he has reason to believe and does believe that malt, brewed, fermented, spirituous, vinous, and in-

toxicating liquors, to wit, beer, whisky and alcohol, are being sold, furnished and given away as a beverage and kept for the purpose of being sold, furnished and given away in the drug store known as Bullock's drug store at and in the unincorporated village of Fenwick, in the township of Fairplains and county of Montcalm aforesaid.

“‘FRANK COLE.

“‘Subscribed and sworn to before me this 18th day of May, A. D. 1911.

“‘WILLIAM A. BRIGGS,

“‘Justice of the Peace.’

“These are therefore to command you in the name of the people of the State of Michigan, together with the necessary and proper assistance to enter into the drug store known as Bullock's drug store in the unincorporated village of Fenwick in the township of Fairplains in the said county of Montcalm and there diligently search for the said intoxicating liquors and implements, to wit, beer, whisky and alcohol and that you bring the same or any part thereof found in such search forthwith before me to be disposed of and dealt with according to law.

“Given under my hand this 18th day of May, A. D. 1911.

“WILLIAM A. BRIGGS,

“Justice of the Peace.”

The material part of section 27 of Act No. 107, Pub. Acts 1909, being the act under which the search and seizure proceedings were taken, which is necessary to be quoted, provides:

“SEC. 27. If any person makes a sworn complaint or affidavit before any magistrate authorized to issue warrants in criminal cases, that he has reason to believe and does believe that any of the liquors mentioned in section one of this act, are being manufactured, sold, furnished, or given away as a beverage or kept for the purpose of being sold, furnished or given away or that any such liquors are stored, temporarily or otherwise, in any depot, freight house, express office, or in any other building or place with the apparent intention of being delivered for the purpose of being sold, furnished, or given away contrary to the pro-

visions of this act, such magistrate shall immediately issue his warrant to any officer whom the complainant may designate, having power to serve criminal process, commanding him to search the premises described and designated in such complaint and warrant, and if such liquors are there found, to seize the same, etc."

Section 29 provides:

"No warrant for search shall be issued until there has been filed with the magistrate an affidavit describing the house or place to be searched, the things to be searched for, and alleging substantially the offense in relation thereto, and that affiant believes and has good cause to believe that such liquor is there concealed: *Provided, however,* that any description that will enable the officer to find the house or place to be searched shall be deemed to be sufficient. The warrant for search shall be directed to the proper officer and shall show by a copy of the affidavit inserted therein or annexed and referred to, or recite, all of the material facts alleged in the affidavit and describe the thing to be searched for and the place to be searched. A warrant for search and seizure substantially in the following form shall be sufficient:" (We omit the statutory form of the warrant.)

The principal objection to the sufficiency of the complaint and warrant under which defendants justify is that the affidavit (complaint), which describes the place to be searched, does not state, as required by section 29, that "affiant believes and has good cause to believe that such liquor is there concealed." This contention of appellant is met by argument on the part of defendants:

"That the word 'concealed,' as used in section 29, is unnecessary and without meaning, * * * and, in view of the purpose of the act and the other provisions thereof, it cannot be possible that the legislature intended that the word 'concealed' must be used in the complaint."

We cannot accept this contention for the reason that the language of this section in terms provides that:

"No warrant for search shall be issued until there has been filed with the magistrate an affidavit describing the house or place to be searched, the things to be searched for, * * * and that affiant believes and has good cause to believe that such liquor is there concealed."

It prohibits the issuing of a warrant, unless the affidavit contains certain statements, among which is the one last above quoted, which is included as a requisite part of the affidavit, as explicitly as the place to be searched, the things to be searched for, and the other requisite allegations. It is therefore impossible for this court, where there is no ambiguity in the statute expressive of the legislative intent, to hold that the warrant may be issued upon a complaint which does not contain each and all of the requisites called for by section 29. The legislature provided further in this same section that the warrant for search upon its face shall "show by a copy of the affidavit inserted therein, or annexed and referred to, and recite, all of the material facts alleged in the affidavit and describe the thing to be searched for and the place to be searched." By this it is evident that the legislature considered that it was providing for an extraordinary remedy of search and seizure, which is clearly in the nature of a criminal proceeding. It took great care to make plain and clear upon the face of the warrant that the requisite showing by affidavit had been made.

It appeared upon the face of this warrant that the magistrate who issued it had no jurisdiction, because of the insufficiency of the complaint. Defendants' entire case depends upon the validity of this warrant, under and by virtue of which all of the acts charged against them, in taking and converting plaintiff's property, were done. As a matter of law, this warrant was void and of no effect. It was not a legal process, and would not operate as a justification for the seizure of plaintiff's property.

Other questions presented and discussed by appellant do not require consideration. The court was in error in refusing to direct a verdict against defendants, for plaintiff, as requested.

The one question remaining to be determined is the value of this property which, from our examination of the record, seems to be in dispute; otherwise this court could finally dispose of this case at this time.

The judgment of the circuit court is reversed, with costs of both courts in favor of plaintiff, to be taxed, and a new trial will be had for the sole purpose of an assessment of plaintiff's damages.

BROOKE, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

EBERTS v. MT. CLEMENS SUGAR CO.

1. MASTER AND SERVANT—DECLARATION—PLEADING—EXPLOSIONS
—BOILERS—SAFE PLACE.

Plaintiff's declaration, alleging that he was injured, while he was in the employ of defendant, from an explosion of its boiler; that for a period of ten years the boiler had not been properly inspected; that excessive heat had been applied to the plates of the boiler, causing them to bulge and strain; that the boiler had become unsafe from use and overheating; that it was defendant's duty not to subject the boilers in its factory to excessive heat; and that the duty rested on defendant to inspect, etc., was not demurrable for the reason that the declaration did not allege that the boiler was imperfectly constructed or of improper material.

182 Mich.—29.

2. **SAME—INSPECTION—NONDELEGABLE DUTIES.**

The duty to inspect a boiler or other machinery cannot be delegated by the master so as to escape liability by virtue of the fellow-servant rule.

3. **SAME—CONTRIBUTORY NEGLIGENCE—DECLARATION.**

Where the declaration averred that the defects in the boiler were unknown to plaintiff, and that he exercised due care and caution, the demurrer of defendant, which set up the objection that the plaintiff was shown to be chargeable with contributory negligence, was properly overruled.

4. **JURY—CHALLENGE TO ARRAY—JURY COMMISSION.**

Under Act No. 367, Local Acts 1895, creating a board of jury commissioners for the county of Macomb, providing for an annual meeting on the first Monday of May in each year, and that the panel for the jury shall be selected from the assessment roll of the preceding year, the trial court was right in overruling a challenge to the array of jurors, charging that the commissioners used the assessment rolls for another year, and did not select the names from the roll of the preceding year, when the evidence showed that the assessment rolls for the year in question were not completed, and the jury commissioners had the rolls of the preceding year, as required by the statute.

5. **SAME.**

No sufficient ground of challenge was proved, because defendant charged that the commissioners drew only nine names of jurors from one township instead of ten from each, as provided by the local act affecting Macomb county, where its attorneys did not exercise any of its peremptory challenges and from the township which defendant referred to only two jurors were drawn on the panel.

6. **MASTER AND SERVANT—SAFE PLACE—BOILERS—INSPECTION.**

And evidence supporting the averments of plaintiff's declaration as to overheating the rear stay plates and loosening the bolts, also, as to failure to inspect the boiler, presented an issue for the jury.

7. **TRIAL—ARGUMENT OF COUNSEL.**

Unfair comments of plaintiff's attorney, in the argument of a personal injury case, to the effect that defendant's witnesses had never seen a boiler, etc., were cured by the statement of the court that the jury would remember the evidence, and by his instructions that it would be their duty to recall and be governed by the evidence.

8. APPEAL AND ERROR—REVIEW—EXCEPTIONS.

In order to review, on error, prejudicial statements or argument of attorneys, it is essential to secure a ruling of the court by bringing the matter to the attention of the court, not simply by taking exceptions.

9. MASTER AND SERVANT—TRIAL—INSTRUCTIONS.

Nor did the trial court err in charging the jury that the plaintiff's right to recover depended largely on two essential facts: (1) Had the stay sheet and connecting stay bolts of the boiler become so defective as to make the boiler more dangerous than one in reasonably good repair? (2) If so, did the servant in charge have actual or constructive notice of the condition?

10. SAME—EVIDENCE—PERMANENCY OF INJURIES.

Also, it was proper to charge that if the jury found plaintiff's injuries to be permanent, they should award to him a sufficient sum of money to compensate him for loss of the ability to earn a livelihood, not exceeding the period of his expectancy; plaintiff's proofs tending to show that his injuries were of a permanent character.

11. TRIAL—SPECIAL QUESTIONS—CONCLUSIVENESS.

There was no reversible error, on the trial of a case arising out of the explosion of defendant's boiler, in declining to submit to the jury defendant's fourth special question whether the first break in the boiler occurred at a point identified in defendant's exhibit, *i. e.*, in the combustion chamber of the boiler, where it was very doubtful if the affirmative answer to the question would have been conclusive.

12. APPEAL AND ERROR—ASSIGNMENT OF ERROR—GENERAL NATURE—SAVING QUESTIONS FOR REVIEW—NEW TRIAL.

An assignment of error that the court erred in denying defendant's motion for a new trial, which contained the objection that the court erred in failing to charge as requested in defendant's requests, was too general, where the requested instructions covered six pages of the record.

13. SAME—WEIGHT OF EVIDENCE.

An assignment of error that the verdict was contrary to the evidence did not raise the point that the verdict was contrary to the overwhelming weight of the evidence.

14. SAME—EVIDENCE.

Held, that the testimony warranted a verdict for plaintiff.

15. EVIDENCE—FORMER VERDICT.

No error was presented by an assignment that the court erred in ruling out the records in a previous action for personal injuries in which plaintiff had recovered a judgment for injuries received in a railway accident, in no way connected, so far as the evidence disclosed, with the injuries for which he claimed damages.

Error to Macomb; Tappan, J. Submitted April 13, 1914. (Docket No. 28.) Decided October 2, 1914.

Case by Charles Eberts against the Mt. Clemens Sugar Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Thomas A. E. Weadock, for appellant.

John A. Weeks, for appellee.

STONE, J. This is an action for damages on account of personal injuries sustained by the plaintiff on the occasion of the explosion or failure of a steam boiler in defendant's sugar factory on November 1, 1911. The declaration alleges that the defendant was at the time stated the owner, occupant, and operator of a factory for the purpose of manufacturing sugar from beets; that in its said factory it maintained and operated a system of steam boilers, constructed of iron and steel, 11 in number, for the purpose of generating steam to operate the machinery and do the other necessary work in such manufacture, which said steam boilers had been used by said defendant for a period of about 10 years; that at the time aforesaid the plaintiff was in the employ of said defendant; that his duty was to unload coal from cars situated on a railroad track adjacent to the place or room in said factory where such boilers were situated, by shoveling such coal from said cars through an open window and space directly into said boiler room, the place where plaintiff was engaged in said work being a distance

of about 20 feet from one of said boilers, known and designated as boiler No. 2; that on the occasion of the injury complained of the plaintiff was engaged in such work of unloading coal, and was in the exercise of due care and caution, and was without fault or negligence on his part. It is alleged that it then and there became and was the duty of said defendant to use reasonable care to provide a safe place in which the plaintiff was to perform such work, and to provide, keep, and maintain each of its said systems of boilers, and particularly said boiler No. 2, in a reasonably safe and proper condition, so that the same would not fail, burst, or explode, because of the defective condition thereof, thereafter mentioned, and thereby injure plaintiff while engaged in such work; that it became and was the duty of said defendant not to so overwork or overtax said boilers, or any of them, beyond their capacity, that the same would fail, explode or burst, and thus injure its employees or said plaintiff; that it was defendant's duty not to overheat or overfire the said boilers, and particularly boiler No. 2, so that the same would become strained beyond their capacity, and the parts thereof, particularly the parts of boiler No. 2, known as the rear stay plate thereof, become burnt, bulged, strained, and thereby weakened; that it was the duty of defendant not to subject said boilers to an excessive heat and excessive pressure, so that the steel plates and steel bolts constituting the parts thereof would become burnt by excessive heat, and strained, bulged, and weakened, so that such boilers, or the parts thereof, would fail, explode, or burst, and thus injure the plaintiff and other employees of the defendant; that it then and there became and was the duty of the defendant to exercise great care and caution to ascertain whether the said boilers, or the parts thereof, and particularly the part of said boiler No. 2, known as the rear stay plate

thereof, had become burnt by excessive heat, or strained, bulged or weakened, and to cause due inspection and tests to be made thereof, by competent, skillful, and efficient engineers and inspectors at reasonable intervals, so that defects, burnt condition, bulging, or weakness, due to excessive heat or pressure, could be discovered and thereby guarded against; and that it then and there became and was the duty of defendant to have efficient, skillful, and competent engineers, inspectors, and firemen in control of said boilers, who would properly and skillfully operate, control, maintain, and inspect said boilers as aforesaid.

The declaration alleges the breach of each and all of said alleged duties, and particularly that for a period of time, to wit, for a period of 10 years next preceding said 1st day of November, 1911, said boilers, or any of them, had not been properly tested or inspected by competent, skillful, and efficient engineers and inspectors; that by means of excessive heat and excessive pressure said boilers, and the parts thereof, and particularly the part of said boiler No. 2, known as the rear stay plate thereof, had become burnt, bulged, strained, and thereby weakened, and incapable of sustaining the steam pressure imposed thereon on said last-mentioned date; that a proper inspection and testing thereof, by competent, efficient, and skillful engineers and inspectors, at any time during the period of two years next preceding said date, would have disclosed that said boilers, and the parts thereof, and particularly the part of boiler No. 2, hereinbefore mentioned, were burnt, bulged, strained, and weakened, and were not in a condition reasonably safe to be used and operated as the same were operated on said last-mentioned date, and that the same was not in a condition reasonably safe to sustain the strain of the usual and ordinary steam pressure im-

posed thereon on said date, and would have disclosed the defective condition thereof, thereinbefore mentioned, and that said boilers, and particularly said boiler No. 2, was not properly cared for, or kept in repair, and was operated after the same became out of repair and defective, in that the same had become burnt by overheating, and in consequence thereof strained, bulged, and weakened, which defects and weaknesses aforementioned were, at and before the time aforesaid, unknown to the plaintiff, but were well known to the defendant, or, if not known, should have been in the exercise of due and proper care on its part; and that the explosion thereof, as thereafter mentioned, resulted from overheating and overtaxing thereof, by means whereof the part of said boiler No. 2, known as the rear stay plate thereof, became burnt, bulged, strained, and weakened, by means whereof the same became liable to and did fail, explode and burst. It is alleged that on said date, while the plaintiff was engaged in such employment of unloading coal at defendant's said factory, and while he was in the exercise of due care and caution on his part, by reason of said negligent acts of said defendant, said boiler No. 2 and the parts thereof, and particularly the part thereof mentioned, and because of the burnt, strained, bulged, weakened, and defective condition thereof, and consequent inability to sustain the steam pressure then and there imposed thereon, failed, exploded, and burst, and escaping steam therefrom enveloped, scalded, and burned plaintiff, throwing him with great violence to the floor, scalding and burning him, and throwing broken parts and débris of said boiler against and upon his body, and plaintiff was severely scalded, burned, bruised, injured, and wounded about his head, back, sides, arms, legs, and body, and all parts of plaintiff's body were deeply scalded and burned, resulting in permanent scars thereof, and

the left side of plaintiff's skull was thereby broken and fractured, so that the broken bone penetrated and injured the brain substance, and so that a portion of the skull was required to be and was thereafter removed, and plaintiff's upper front teeth were thereby forced out and removed, and the sight of the plaintiff's right eye was thereby injured and destroyed, and dust and mud were thereby forced under the skin of plaintiff's face, resulting in permanent disfigurement thereof, and the nerve centers of plaintiff were thereby injured, resulting in loss of power of motion of his right arm, leg, and side, and thereby plaintiff's brain was injured, resulting in disturbance of brain functions and partial loss of memory, and plaintiff was injured by the shock, strain, and concussion he then and there received, and his nervous system was then and there affected and injured, all of which injuries were and always will be permanent.

To this declaration defendant demurred for the following reasons:

"(1) Plaintiff alleges in his declaration that the boiler which failed or exploded had been in use for 10 years, and does not allege that the boiler was imperfectly constructed, nor of improper material. Steam boilers are always dangerous, may explode at any time, which plaintiff well knew, and the defendant was not and could not be required to insure the safety of the boilers.

"(2) If the boiler was overtaxed and subjected to overheating or overpressure, as alleged in plaintiff's declaration, such overtaxing, overheating or overpressure was caused by the fellow-servants of the plaintiff, and he cannot recover.

"(3) The engineer, inspectors, and others in charge of the boilers mentioned in plaintiff's declaration were fellow-servants of plaintiff.

"(4) If the rear plate, or any portion of boiler No. 2, mentioned in this cause, was burned so that it bulged outward and was thereby made weak, as alleged in plaintiff's declaration, that fact was as apparent to

plaintiff as to any one else, and if he continued working in the vicinity of the said boiler and did not give notice of such faulty condition and have the assurance that it would be speedily repaired, he was guilty of contributory negligence and cannot recover.

"(5) If plaintiff's allegations as to the want of inspection, the condition of the boiler No. 2, the rear stay plates thereof, and the other portions thereof, referred to in his declaration, were true, it must long have been well known to plaintiff himself, and if he had given no warning of the defective condition so observable by him, and, as appears by his declaration, he continued to work near and by the boiler No. 2 aforesaid, he was guilty of contributory negligence thereby, persisting in a place of known danger, and he cannot recover."

Said demurrer was overruled by the circuit court, and defendant thereupon applied to this court to have such decision reviewed by certiorari, under the provisions of Act No. 310 of the Public Acts of 1905. The writ of certiorari was denied by us, and defendant now asks us to review such decision of the circuit court by assignment of error herein, in accordance with the provisions of said act.

The defendant having pleaded the general issue, the case came on for trial before a jury. When a full jury appeared the defendant challenged the array, for the following reasons:

"Because the board of jury commissioners of said county did not select the list of names from which said panel of jurors was drawn in the manner prescribed by law therefor.

"Because said board did not select such names making up said list from the proper assessment rolls of the several townships and wards of said county.

"Because, as appears by the records, the said board of jury commissioners used the assessment rolls for the several townships and wards of said county for the wrong year, from which to select said list of names.

"Because the said board did not select the number

of names from all the assessment rolls of the several townships and wards prescribed and required by law.

"Because the drawing from the list prepared by the said board of jury commissioners by the circuit judge, sheriff, and county clerk of the panel of jurors for the March, 1913, term of said court was not conducted in compliance with the requirements of the statute.

"Because it does not appear from the record of the proceedings of said officers that said drawing was properly made from the lists prepared by said board for petit jurors."

The said challenge to the array was overruled by the court, to which ruling the defendant excepted.

Act No. 367 of the Local Acts of 1895 provides a board of jury commissioners for the county of Macomb, and the manner of selecting jurors to serve in the circuit court for said county. Section 2 of this act provides that said board shall meet annually on the first Monday of May in each year, at the office of the county clerk, and shall then and there select from the assessment rolls of the several wards and townships of the said county, for the preceding year, a list of names of persons to serve as petit jurors in the circuit court of the said county for the succeeding year. It provides that the county clerk shall be the clerk of the said board, and shall keep a record of their doings in a book to be provided for that purpose, which record shall, at the close of each meeting of the board, be signed by the members thereof and attested by the said clerk, and shall then be evidence in all courts and places of the doings of the said board. This record was not offered in evidence, so far as appears by this record, and it is impossible to ascertain the actual facts that were before the court upon this inquiry. The defendant claims that the jury commission, at its May meeting in 1912, used the assessment rolls for the year 1912, instead of the assessment rolls of 1911, as the statute required.

After overruling the challenge, the court, after the

jury had been instructed and had retired, permitted the testimony of Mr. Hall, who was the county treasurer in May, 1912, to be taken as to which assessment rolls were used by the jury commission at their annual meeting in May, 1912. He testified that he gave said board the rolls of 1911, and that the assessment rolls of 1912 were not in his office at that time, that said last-named rolls were not in his office at any time in 1912, and that he was positive that the rolls used by said commissioners at the May meeting of 1912 were the assessment rolls of 1911.

It was the further claim of defendant that instead of 10 names being drawn from each ward and township, as required by the statute, they fell short of that in one instance, and only 9 names were drawn, and that there were two jurors on the panel that came from the township where there was a shortage. The local act above referred to provides that at least 14 days before the first day of any term of the circuit court for the said county at which a jury is to be in attendance, the said county clerk shall, in the presence of the circuit judge, and in case of his absence from the county, or of his disability to attend, then in the presence of the probate judge and the sheriff of the said county, proceed to select a jury for the next term of the said court in the manner following:

“The package containing the names of the jurors shall be arranged in alphabetical order, and shall in such order, beginning at ‘A,’ be separately opened and the slips therein placed in a box to be known as the jury box. The box shall then be shaken in such manner as to thoroughly commingle the slips, and one of the persons in attendance shall draw therefrom one of the slips of paper, and the name appearing thereon shall be a juror for the said term of court; the remainder of the packages shall then be successively treated in the same manner in alphabetical order until such number of persons have been chosen as the said circuit judge shall have directed to be drawn for the

said term, and such persons so chosen shall be the jurors for the said term, and each drawing after the first shall begin at the package next succeeding in alphabetical order the one last used in the preceding drawing. * * * A record of the said drawing shall be kept by the clerk in the same book in which the record of the doings of the jury commissioners is kept. When a name is drawn from the said box, and duly recorded, the slip containing it shall be destroyed and the remaining slips containing the names from the said township or ward shall again be returned to a package and sealed and indorsed as before to await the next drawing."

The certificate of the drawing of the petit jurors for the term of court at which this case was tried was as follows:

"We, the said officers, did proceed to draw the said jurors in alphabetical order; we did first open the package marked 'Ray,' that being the next package succeeding in alphabetical order the one last used in the drawing last before this, as appears by the record of said drawing, and placed the slips therein in a box known as the jury box, caused the same to be shaken so as to thoroughly commingle the slips, and thereupon the county clerk drew therefrom one of the slips which contained the name of Lewis Broughton, and thereupon the remaining slips contained in said package were returned thereto, and the same sealed and closed to wait the next drawing, and in the same manner the following named persons were drawn as jurymen and in the following manner. [Here follow the names and townships from which they came.] The names appearing in the above list being the names appearing on the several slips as so drawn as jurors for the townships and wards set opposite their respective names above, and when in each drawing a record was made of the name, the slip containing the name was destroyed, and said drawing proceeded in said manner until the number of jurors heretofore ordered to be drawn by the circuit judge, to wit, 30, was drawn."

This certificate was dated and bore the signatures

of the circuit judge, sheriff, and county clerk. The objection made to it by the defendant was that it did not appear that the officers followed the packages in alphabetical order. The trial court ruled that it would be presumed that they did unless the contrary appeared, to which ruling defendant excepted.

Upon the trial of the case the plaintiff introduced testimony tending to support the allegations of the declaration. The volume of testimony is too large to warrant us in quoting at length therefrom. It was the claim of the plaintiff that by overcrowding or overheating the said boiler the rear stay plate became bulged or corrugated between the stay bolts, so that the holding strength of the rear stay plate was reduced, and the failure resulted; that this bulging had existed for two or three years prior to the failure; that it was a dangerous condition likely to result in a failure or explosion, and would have been readily disclosed upon due inspection; that the space in the stay sheet had been pressed, or bulged out by the internal pressure to the extent of one-eighth to one-half inch, the effect of which was to pull the threads of the rear stay plate and the stay bolts apart, that is, as the plate pushed out, the threads of the plate and the bolt, commencing at the internal side, would separate; that the internal threads would separate, while the threads on the external side would remain in contact and prevent leaking.

One of plaintiff's witnesses, George Kopoydlowski, a boiler maker, examined the boiler in question in July or August, 1911. Among other things, he testified as follows:

"We went inside of the boiler to look for the leaks and see if there were any leaks in the boiler, and discover any weak spots in it. We examined it by going inside, and through it, and looking over every bit, and seeing if there were any leaks around there; that was our business to do that. We scratched around

it with the chisels, and it shows whenever there is a leak; we don't do much tapping. On that boiler we didn't find any indication of any leaks. I looked at the rear stay plate and examined it.

"Q. Did you examine the heads of the stay bolts?

"A. We see the bolts. The bolts didn't look good, as I said before; they were peeling off from the sheet a little bit, to tell the truth. We looked at the stay plate, and it was corrugated a little bit, that is all; it wasn't straight. It was corrugated right straight across in the center of it.

"Q. How much of the surface of the stay plate was corrugated?

"A. I am guessing at it. I had no straight edge on it. I can guess at it, about one-eighth of an inch, and if I say any more or less I am not sure of it. I did not put a straight edge on it to see how much it was corrugated. I think it was raised one-eighth of an inch. I was inside that boiler probably an hour or 20 minutes or so, not any longer. Mr. Henze was there. He did not go inside of the boiler. After I came out of the boiler I had a talk with Mr. Henze, the chief engineer of the company. I told him that 'everything looks tight inside but the bolts.' I told him, 'They don't look very good to me,' and the chief says, 'It don't leak?' And I says, 'No,' and he says, 'Is everything tight?' and I said, 'Yes,' and it was, and he said, 'Fix it so it don't leak.'

"Q. What did you say to him that didn't look good?

"A. Some of them stay bolts I said they didn't look good to me; that they were peeling off, but they didn't leak.

"Q. What was the condition of the stay bolts?

"A. That's something I couldn't say, because they didn't leak, and what can I say? They were just peeling off or lifting off from the sheet, and the only way I could fix them was to hammer them over again.

"Q. How was the beading on the heads of the bolts?

"A. That's what I am talking about; they were lifting off the sheet and were not close enough to the sheet.

"Q. Could you see any hammer marks on the beading?

"A. The stay bolts would be hard to tell, as they

were all marked up, and they were all pounded up, and you can't tell by the marks on them. There was a test made of the boiler while I was there. The chief engineer, Mr. Henze, tested the boiler. I looked at the gauge a couple of times, but I had nothing to do with the pumps. He put on a cold-water test.

"Q. How much pressure did he put on?"

"A. As I looked at the gauge it was 90 pounds that I could see of cold water.

"Q. Did he put on more than 90 pounds of cold water?"

"A. As I say, I see it 90 pounds, and probably he went up to 95, and may be not any more, as they couldn't get any more from those pumps. * * * I saw the boiler after the accident, laying out in the yard back of the works.

"Q. What part of the boiler had failed?"

"A. The back end of the boiler gave out, the rear stay plate; the back head gave out; the inside she gave out and pulled it out."

John C. McCabe, city boiler inspector of Detroit, a man of experience, testified that he examined the boiler after the explosion and found bulging between the stay bolts; that the plate between the stay bolts had been bulged forward in one place as much as half an inch. He said:

"I found the rear stay plate thrown forward to the tube sheet; I found bulging in between the stay bolts and found marks of the hammer around about the stay bolt ends; around a large number of the stay bolt holes in the stay sheet which failed; I found a portion of the beading of the head showed marks by recent contact with the head, and in a greater portion of the surface where the heads had been in contact, there was no evidence of any contact, but, on the other hand, there were hammer marks showing that the beading had been off for some time.

"Q. What was the condition of the beading?"

"A. The beading had been practically destroyed, and there is evidence that the stay bolts had been very badly hammered up. It was evident that on account of the buckling of the plates there had been leaks,

and the only possible excuse for pounding up the stay bolts was to stop leaks temporarily.

"Q. Whether it had been done in a good workman-like manner, hammering up those bolts?

"A. That work was entirely wrong, for the reason that it was very evident that the stay bolts were loose; the buckling of the plates necessarily pulled the threads holding the stay bolts from their contact with the stay bolts, and the only possible purpose which it could serve would be to stop temporary leaks. When I made my examination of the boiler, I found the greater portion of the plate above, possibly the third row from the bottom were more or less bulged; the greater bulges appeared to be at the higher part of the plate. Between a half and three-quarters of the stayed sections were bulged more or less. The greatest bulging I noticed was one-half inch, and from that down to one-eighth of an inch, and some three-eighths and some one-quarter. That bulging could not have been caused by the failure of the boiler in question. My calculations show that the plate could not have been bulged from an internal pressure of less than 337 pounds, as it was very evident there was no possible means of getting 337 pounds, or upwards on the boiler, and the only other possible way for it was by an increase of temperature that would reduce the strength of the plate to a point that would admit a bulging from the pressure which was carried on the boiler, which was not to exceed 105 pounds."

The foregoing is but a small part of the testimony of this witness. He further testified that the bulging was the *cause* and *not* the *effect* of the failure of the boiler, in his opinion, and that the stay plate failed because of the weakened condition of the threads of the stay bolts, which would have been readily discernible by proper inspection, and that a proper test of the boiler required a hydrostatic pressure of 150 pounds. It was the claim of the plaintiff that Kopoydowski did not make an inspection, as that was out of his line of business, but that Henze should have made a proper inspection after it was reported to him that the condition of the bolts was such as to attract the

attention of the witness, in the manner described. On the defense Henze denied that Kopoydlowski made such a report to him, and Prof. M. E. Cooley testified that a bulge in a boiler of one-fourth to one-half an inch is ordinarily of no consequence; that a boiler with bulges in a rear stay plate, or sheet, from one-fourth to one-half an inch is reasonably safe for use, especially so if the stays themselves did not leak.

"Q. If a boiler had bulges in it, and it had been repaired, and had afterwards ran for nearly three years without leaking, what would be your judgment as to whether the bulges had any effect on it?

"A. The bulges would not have had any effect on its strength in such cases as that. * * * I have investigated the boiler in this case very thoroughly. My first examination of it was on January 22d, the second about May 5th, then the third last Friday, all in this year. The examination I made last January was very brief, and in expressing my opinion after that time, I took the testimony taken in the case to guide me, and it occurred to me then that the explosion might have resulted from the tearing away of the tube sheets, as was set up in that testimony, but my later examination showed that this was not the cause of the explosion, but rather the result of it. The condition of the fractured edges of the plate itself satisfied me as to this.

"Q. What, in your judgment, caused the failure of that boiler?

"A. After careful examination of the boiler itself, and the study of the testimony introduced in the case, I reached the conclusion that this explosion could not have been caused by the giving way of the stays, and when I came down and spent the afternoon examining the boiler, after the first time, I discovered another fracture which I had not found before, and which has not been referred to before in this case. I mean the fracture which is shown in this sketch by the heavy black line near the upper left corner of the combustion chamber, where the crown sheet joins the curtain sheet. I did not know this existed, until I looked into the boiler, and the first examination of

it disclosed all the earmarks of an initial rupture. For boiler explosions are made up of two parts, first, an initial rupture; the boiler gives way and drops, the pressure and the water and steam together create and form a pressure, which ruptures and tears the boiler all to pieces. The difference between a failure and an explosion is that when a boiler fails in some particular place, it lets the water and steam out without exploding and blowing the boiler asunder; both a failure and an explosion must have an initial rupture. This initial rupture is splendidly shown in Exhibit No. 15. You can see from this exhibit that the torn edges of the plate are doubled over and bent around, something like a seam of a hem on a garment, and the calipers show that the thickness of the plate where it is torn has not been reduced. It is $7/16$, as near as I could measure it, and that indicates that it was torn like the plate at the manhole, but that it broke off, and it broke off like that to give way, the steam rushing out, caused these edges of the plate to turn around into the form of a seam. * * *

There was no evidence whatever, visible to the eye, that the tube sheet had ever been burned, nor did I see any evidence that it had been overheated. I noticed the bulges in the stay sheet, at the time of my examination, and from it I should say unhesitatingly that they were more of the result of the explosion, and I still think so, notwithstanding other testimony to the contrary. Those bulges were all the result of, and not the cause of, the explosion. I have listened to Prof. Bragg's testimony as to the design of this boiler, and to me it seems perfectly correct. He is perfectly right in emphasizing the fault, due to the location of that outer row of stay bolts, next to the crown sheet. He might have emphasized more strongly the effect of expansion on the top row of tubes, the top of the combustion chamber, back to this top row of stay bolts, that under a difference in temperature, increased in length $3/16$ of an inch; he might have emphasized more strongly the effect of that elongation on the bending of this plate, in the vicinity of this seam, which would start this initial rupture, and that in my judgment is what caused that plate to kick back and forth and start it. The location of these stays so close in the curve of the stay

plate practically amounts to the expansion of the plate itself, and the riveting of it to the rear head of the boiler. This holds the plate as if in a vise, and expansion and contraction must have the effect of bending back and forth the plate in that vicinity. They should have been placed several inches away from this rigid point to allow for the plate to bend. Those stay bolts, in the position they were in, were of no practical use, but did actual harm; they should have been located away from this sheet to give a chance to bend. As a result the bolt next to this is forced away beyond its capacity, and tends to strip the thread of the bolt.

"Q. What connection would that have with the initial rupture?

"A. If the threads were stripped off, it would produce a bigger load, would throw a bigger load on this same joint, and also a strain on the fracture itself. This Scotch marine boiler I have known to be in common use for nearly 40 years. The bulging itself is not particularly dangerous. If there was to be any bulging, due to low water, it would take in the crown sheet, and that is one reason why I thought this could not be due to overheated plates. Another reason is that if these plates had been heated to the point which would permit bulging, the bulging would not have stopped at $\frac{1}{8}$ or $\frac{1}{4}$ of an inch. * * * I take it that this bulge in the stay plate could not have been caused in the way stated, and as a matter of fact that could not be the source of any particular weakness in the boiler. * * *

"Q. State whether or not, in this boiler, it is possible for the heat to become so intense that the water is driven away from the rear stay plate?

"A. That is not possible, and you can speak with a great deal of positiveness on that; it is not possible for a blanket of steam to form next to the plate.
* * *

"Q. Please give your attention to this answer: 'In a boiler of this construction, the products of combustion, owing to their velocity and quantity, naturally throw back and strike this rear stay plate before they can return, and enter the tubes to carry them off. On account of the intensity of the fire, the rate of generation of steam is very rapid on this plate, and

in the generation of the steam it rises on the face of the plate, and by the time the steam from the lower portions unite with the steam generated higher up, it makes considerable of a blanket between the water and the plate, and in cases where the firing is extreme, or where there is scale, sediment, oil, or any other semi or non conductor in the water, there is great danger in overheating the plate, and causing bulging at comparatively low pressure.' What do you say to that?

"A. I say there is nothing to it at all; it cannot possibly happen.

"Q. In case the stay bolts are $7\frac{1}{2}$ inches apart, would a bulging of less than a quarter of an inch, in your judgment, cause it to leak at the stay bolt?

"A. I shouldn't expect it would.

"Q. What effect has the beading on the stay bolt, in adding to the holding strength of the bolt, if any?

"A. I think it adds a little, and it depends on the amount of the beading, and how well it is done; the beading in these boilers, I don't think added greatly to the strength. * * *

"Q. What do you think of this testimony: 'Whether a boiler whose stay plate bulges between the stay bolt a quarter of an inch would be in a reasonably safe condition for use depends in a measure on the pitch of the boiler; as regards to this particular boiler, it would not be in a good, reasonable, safe condition?'

"A. In my judgment the boiler would be safe under those conditions.

"Q. What do you think of this testimony: 'Q. Do you think that a boiler with a bulge in it of an eighth to a quarter of an inch, where the stay bolts are $7\frac{1}{2}$ inches apart, would affect the threads on the stay bolts? A. Absolutely it would?'

"A. It might affect them a little theoretically, but practically not at all; if it did, leaks would result, which would be discovered at once, or very soon.

"Q. What do you think of this testimony: 'I don't think that the failure of this boiler was due in any way to the construction of the boiler?'

"A. To my mind it lies altogether on the design and the construction of the boiler, and that is the cause of the failure."

There was other testimony to the same effect; also that a chemical examination of the stay plate of the boiler disclosed that for all purposes it was as it should be, and showed absolutely no trace of burning in the plate, and that the same was true of the stay bolts. In rebuttal there was testimony to the effect that the construction and design were proper, and that the crack referred to by Prof. Cooley was the result of the failure and not the cause of it.

In the course of his argument to the jury one of plaintiff's attorneys said:

"The testimony that we have produced is from workmen. We haven't tried to go to Ann Arbor or to the university to produce theoretical men, and men that have never seen a boiler before."

This remark was excepted to by defendant's counsel, whereupon plaintiff's attorney said:

"Can I proceed without interruption?"

"*The Court*: Counsel have a right to interpose an objection. The jury will remember the facts."

At the request of defendant's counsel three special questions were submitted to the jury. They were as follows:

"1. Was the rear stay sheet in the boiler in question overheated before November 1, 1911?"

"2. Was the rear stay sheet of the boiler in question burned prior to the accident on November 1, 1911?"

"3. Did the bulges in said stay sheet, being one-eighth to one-quarter of an inch in depth, affect the stay sheet so that it was not reasonably safe on November 1, 1911?"

Each one of said special questions was, by the jury, answered in the affirmative.

The court declined to submit the following special question:

"4. Did the first break in the boiler, when the accident happened on November 1, 1911, occur in the

spot marked in black on 'Exhibit 5,' and shown in the photo 'Exhibit 15,' being in the upper left-hand corner of the combustion chamber?"

To which ruling defendant's counsel excepted.

The trial resulted in a general verdict for the plaintiff in the sum of \$7,000. There was a motion for a new trial by defendant, the third ground therefor being: "The verdict is contrary to the evidence given in the case." This motion was denied as not supported by the record, and counsel for defendant duly excepted. The defendant has brought the case here upon writ of error, and there are 91 assignments of error.

1. The first assignment of error is to the effect that the court erred in overruling defendant's demurrer to the declaration. In considering the first ground of demurrer, we think it sufficient to say that, as we understand the declaration, the plaintiff does not seek to recover on the ground that the boiler was imperfectly constructed, nor because of improper material.

The second and third grounds of the demurrer raise the question of fellow-servants of plaintiff. Some portions of the declaration may be treated as surplusage, yet the duty to inspect is clearly alleged, as well as the breach of that duty. We have frequently held that this duty is nondelegable. The duty of inspection, when required by the circumstances of the case, cannot be delegated by the master in such manner as to avoid responsibility. *Van Dusen v. Letelier*, 78 Mich. 492 (44 N. W. 572); *McDonald v. Railroad Co.*, 108 Mich. 7 (65 N. W. 597); *Orso v. Engineering Works*, 164 Mich. 568 (129 N. W. 673); *Druck v. Lime Co.*, 167 Mich. 154 (132 N. W. 492); *Scendar v. Copper Co.*, 169 Mich. 665, 669 (135 N. W. 951).

The fourth and fifth grounds of demurrer are to the effect that if the boiler was defective as alleged,

the fact was as apparent to the plaintiff as to the defendant, and that he was guilty of contributory negligence in continuing in a place of known danger. We have called attention to the allegation in the declaration "that the defects in the boiler were, at and before the time aforesaid, unknown to the plaintiff," and it is also alleged that plaintiff was in the exercise of due care and caution on his part. We passed upon this question in *Cristanelli v. Mining Co.*, 154 Mich. 423, at page 429 (117 N. W. 910). We are of the opinion that the court did not err in overruling the demurrer.

2. The second assignment of error relates to the action of the trial court in overruling defendant's challenge to the array. We are of opinion that in the state of this record it sufficiently appeared that the assessment rolls of the proper year were used by the jury commissioners. The rolls of 1912 were not yet completed. In any view of the matter we do not think that the challenge to the array could be sustained upon that point. *Niles v. Schoolcraft Circuit Judge*, 102 Mich. 328 (60 N. W. 771).

The other point raised as to the conduct of the jury commissioners is disposed of by our ruling in *People v. Macgregor*, 178 Mich. 436 (144 N. W. 869).

Further, it was claimed by defendant that only two jurors in the panel came from the township where there was a shortage, and the record does not show that the defendant exercised any of its peremptory challenges. The certificate of the circuit judge, sheriff, and county clerk, as to the drawing of petit jurors for the term is not open to criticism, for it expressly appears that they "did proceed to draw the said jurors in alphabetical order." In our opinion the court did not err in overruling the challenge.

3. The next 72 assignments of error relate to rulings, at the trial, in passing upon the admissibility of testimony. We have given them all very careful con-

sideration, and have read the entire record, and are of the opinion that the court therein did not commit reversible error.

4. It is claimed that the court erred in refusing to direct a verdict for the defendant at the close of the evidence, for the reason that plaintiff had failed to make out a case. We do not think that the court erred in that particular.

We have quoted enough of the testimony to show that upon the principal questions involved, there was a sharp conflict as to the facts and the conclusions to be drawn therefrom. It was the claim of plaintiff, and there was evidence tending to support it, that the boiler in question had been installed for 10 years; that two or three years before the failure the boiler had been operated at a time when there was little or no water in it, resulting in overheating it; that at the time the fires were drawn it was discovered that the stay bolts had been loosened, and that there were corrugations in the rear stay plate.

Just prior to the campaign of 1911 a witness testified that he discovered the bulging and the condition of the stay bolts, as above set forth; he testified that he reported this condition to Henze, defendant's chief engineer, who, it is claimed, made no effort to cause an inspection of the boiler to be made.

Upon these claimed facts the plaintiff invokes the application of the doctrine stated in *Woods v. Railway Co.*, 108 Mich. 396 (66 N. W. 328), that while not an insurer, it was defendant's duty to use reasonable and ordinary diligence in providing safe machinery and appliances in the first instance, and, by continued inspection at such intervals as the reasonable and proper conduct of such a business requires, to ascertain whether the appliances continue in safe condition, and, if unsafe, to put them in safe condition; that to the extent that this duty of inspection

goes, it is the master's duty, which he cannot escape or delegate.

5. The seventy-seventh assignment of error complains of that part of the argument of plaintiff's counsel above set forth. The argument was improper and unfair, as it was to the effect that all of defendant's witnesses from Ann Arbor had never seen a boiler. The fact was that the witnesses Cooley and Bragg had had large experience with boilers. But we think that the error was cured by the remark of the court that the jury would remember the facts. In the main charge the court also particularly called the attention of the jury to their duty to recall and be governed by the evidence.

Referring to the other assignments of error upon other parts of the argument, it is only necessary to say that the record shows that defendant's counsel simply excepted to the remarks of counsel, and it does not appear that the attention of the court was called to the matter, or its ruling secured. We have so often and so recently ruled upon this subject that a reference to the cases is hardly necessary. *People v. Auerbach*, 176 Mich. 23-48 (141 N. W. 869) ; *People v. Danenberg*, 176 Mich. 337-339 (142 N. W. 347).

6. The eighty-third assignment of error is to the effect that the court erred in charging the jury as follows:

"Now, gentlemen, having in mind the instructions given you and the opposing theories of the parties, you are further instructed that the plaintiff's right to recover will be largely governed by two essential facts:

"*First*. Had the stay sheet and connecting stay bolts of the boiler in question become so defective and out of repair as to make the boiler more dangerous than a boiler in reasonably good repair?

"*Second*. If the stay sheet and connecting stay bolts were not in a reasonably good repair, and had become defective and dangerous because of such de-

fective condition, did Mr. Henze, the engineer in charge, have notice of this condition?

"Or, if he had no actual notice, were the stay sheet and stay bolts so out of repair that the company, in the exercise of reasonable care and prudence, should have made further examination, and discovered and repaired the defects?"

In view of other portions of the charge upon the subject of the duty of inspection, and in view of the special questions submitted at defendant's request, we do not think that the court erred in giving the above quoted instructions.

7. The eighty-fourth assignment complains of the following language of the charge:

"The mortuary tables show that a man of his age has an expectancy of life of 33 years. That is shown by mortuary tables which are in use in this State, and it is a proper guide to you as to the probable duration of the man's life."

This language was prefaced by the following:

"If, under the proofs, you find that plaintiff's injuries are permanent, then you will include in your award a sum of money to compensate him for loss of ability to earn a livelihood at common labor during the future years, not exceeding his expectancy of life."

Defendant presented no requests to charge upon this subject, and as there was evidence tending to show that plaintiff's injuries were permanent, and as to his condition at the trial, we think that the charge upon this subject falls within the rule stated by us in *Belmer v. Tanning Co.*, 160 Mich. 669-678, 679 (125 N. W. 726).

8. The eighty-fifth assignment of error is that the court erred in refusing to submit to the jury the fourth special question submitted by the defendant. We are of opinion that, in view of the other questions submitted to the jury, it was not error to refuse to

submit the fourth. We do not think that the answer to this question would have been conclusive. We doubt, if this question had been put and answered as the defendant desired, if it would have overruled a general verdict for the plaintiff. *Power v. Harlow*, 57 Mich. 107 (23 N. W. 606).

9. Error is assigned because the court denied defendant's motion for a new trial. Turning to the motion we find that the second ground stated is that the court erred in not charging the jury as requested by the defendant in its several requests, which were refused by the court. An examination of the record discloses that defendant's requests to charge cover six pages of the printed record. An examination of them shows that some were given by the court, and some clearly should not have been given. The assignment of error is too general to be considered, under our repeated decisions. *Green v. Brookins*, 23 Mich. 48 (9 Am. Rep. 74); *Tupper v. Kilduff*, 26 Mich. 394; *Finch v. Karste*, 97 Mich. 20 (56 N. W. 123); *Wanner v. Mears*, 102 Mich. 554 (61 N. W. 2); *Snyder v. Patton & Gibson Co.*, 143 Mich. 350 (106 N. W. 1106); *Nissly v. Railway Co.*, 168 Mich. 676 (131 N. W. 145, 135 N. W. 268, Ann. Cas. 1913C, 719).

Another ground of the motion was that the verdict is contrary to the evidence given in the case. We do not think that this assignment raises the question whether the verdict was contrary to the overwhelming weight of the evidence. We are of opinion that there was evidence to support the verdict, and it would seem from the result that the jury believed such evidence.

10. The ninetieth assignment of error is to the effect that the court erred in refusing to admit in evidence the records of the circuit court of Macomb county in the case of the plaintiff v. Detroit, Mt. Clemens & Marine City Railway, in an action in which he

recovered \$1,500 damages for personal injuries. 151 Mich. 260 (115 N. W. 43). Counsel for defendant does not give us the page of the record where this offer was made, and a patient examination of the printed record has failed to disclose any such offer. Plaintiff was cross-examined on the subject of such suit, and he testified that he recovered such sum for an injury in 1905. His physician testified that there was no relation between plaintiff's condition at this trial, and the injury from which he suffered at that time. No error is presented by this assignment.

Finding no reversible error in the record, the judgment of the circuit court is affirmed.

MCALVAY, C. J., and BROOKE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

CITY OF KALAMAZOO v. STANDARD PAPER CO.

1. PLEADING—JOINDER OF TORT AND ASSUMPSIT—CASE—TRESPASS ON THE CASE—TROVER—MISJOINDER.

Where a municipal corporation commenced an action for unlawful tapping of its water mains and unauthorized use of water from the city water supply, setting up in its declaration the ordinance relating to the use of water, so as to establish the existence of a contract relation between the parties, there was no misjoinder of the first three counts that sounded in case, and the remaining counts which were intended to be in trover for the illegal conversion of water, the ordinance prohibiting consumers of water from taking water without metering and paying for it.

2. TRIAL—EXHIBITS—JURY.

While it is improper practice to allow the jury to take to the jury room, when they retire, memoranda or exhibits, without the consent of opposing counsel, if the appellant was not prejudiced by such proceeding it is not reversible error, and where the plaintiff introduced in evidence extended computations showing the amount of water claimed to have been unlawfully diverted from the city pipes, extending over a period of years, and the jury was allowed to have these computations, no reversible error was committed, their verdict being much less than the totals claimed.

3. WITNESSES—CROSS-EXAMINATION—STATUTES.

Where plaintiff called for cross-examination the agents and servants of defendant, and they gave testimony under Act No. 307, Pub. Acts 1909 (5 How. Stat. [2d Ed.] § 12865), the court committed no error in charging the jury that the plaintiff was not bound by their answers and might accept as true such part or parts of their testimony as it might elect, further cautioning the jury that they must consider all the testimony in the case and making it clear to the jury that such testimony as was favorable to defendant was not eliminated but was to be weighed or considered with the other testimony.

4. MUNICIPAL CORPORATIONS—WATER SUPPLY—TAKING ILLEGALLY.

In an action by a city against a corporation consumer of water, which had tapped the mains and diverted water around the meter without paying for it, evidence tending to show that sham or wrongful devices were installed for the purpose of taking defendant's water without metering it, and to conceal the true state of facts, justified the charge of the trial court that if defendant secured water without charge by this means, it was liable even if its officers, directors, and stockholders did not know of the wrongful use.

5. SAME—DAMAGES—EVIDENCE—UNCERTAINTY.

Where it was uncertain how much water had been illegally taken from the municipal mains, and the plaintiff claimed the value of the whole amount which its evidence showed could have been taken or converted, the want of certainty in the element of damages was attributable to the defendant's fault, and although defendant claimed that such an amount could not have been diverted, the defendant cor-

poration was liable for the full value of the property at the time of conversion, with interest to the date of judgment.

6. SAME—CONVERSION—EXCESSIVE AMOUNT OF DAMAGES.

Damages amounting to \$15,840 *held*, to be warranted by plaintiff's evidence.

7. TRIAL—ARGUMENT—APPEAL AND ERROR.

Arguments called out by remarks of appellant's attorney, and objected to by him, were not prejudicial error when they were made in response thereto and were cured by the instructions.

Error to Kalamazoo; Knappen, J. Submitted April 20, 1914. (Docket No. 22.) Decided October 2, 1914.

Case and trover by the city of Kalamazoo against the Standard Paper Company for the conversion of water from the pipes of plaintiff. Judgment for plaintiff. Defendant brings error. Affirmed.

Harry C. Howard, for appellant.

Marvin J. Schaberg (*John W. Adams*, of counsel), for appellee.

KUHN, J. This is an action brought by the city of Kalamazoo against the Standard Paper Company, to recover the value of water which plaintiff alleges was converted by the defendant during the period from November 17, 1906, to November 17, 1910.

The defendant company is a manufacturer of paper, and in the process of manufacture uses a large amount of water. It had constructed an aqueduct, by means of which it could bring water from the Kalamazoo river to reservoirs near its mill. In 1906 an automatic sprinkling device was installed by the defendant, ostensibly with two sources of supply; one being a pressure pump pumping directly from the defendant's reservoir, the other being the city water

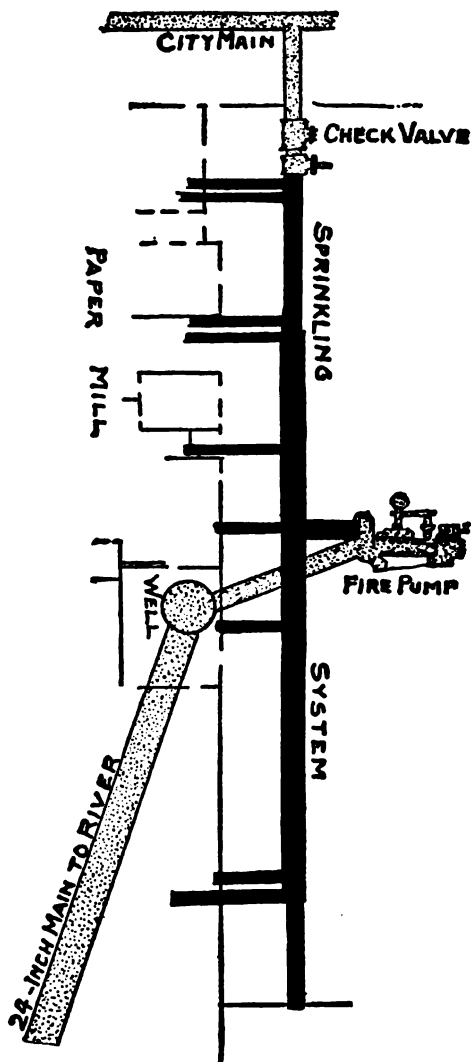
brought to the sprinkler system by a six-inch line connected with the city mains. This is a customary arrangement to insure a supply from the factory's own source and a supply from the outside in case of injury to the private supply during a fire. The city water was furnished by direct pressure from the city waterworks, and the defendant's pressure pump and the city waterworks were connected on the same line. This arrangement is shown by the defendant's Exhibit 4, here set forth.

At this time there was no meter on the city's line to this sprinkler system, nor on the lines to sprinklers in other factories. There was a clapper valve in the line designed to keep the water pumped by the pressure pump from entering the city mains when the private pressure exceeded the city pressure, and only to allow the city water to pass into the sprinkler system when the private pressure fell below the city pressure.

During the aforementioned period, there were three water service lines to the defendant's property. One was a three-fourths-inch metered pipe furnishing water to the office. Another was the line to the sprinklers, just described. The third was a 4-inch main, with a 2½-inch metered connection running to one of the two overhead tanks which supplied the filtered water for the manufacturing process. The city installed a sealed 2-inch by-pass around this meter, to be used only when the meter should be taken out for repairs.

It is charged by the plaintiff, and support thereof is found in the evidence, that the defendant opened the 2-inch by-pass around the meter, tapped the sprinkler system in numerous places, made connections on the three-fourths-inch pipe ahead of the meter, and unlawfully took and used city water from these three sources without its having been registered

DEFENDANT'S EXHIBIT 4



by meters and without paying for it, in violation of ordinance No. 197 of the city of Kalamazoo, which provided rules and regulations under which water was to be used. It is charged, and there was evidence to support it, that there were 27 taps put on the sprinkler system and water taken through them under orders from the defendant's superintendent and with the approval of the defendant's manager.

In August, 1910, computations having been made which showed that less than 50 per cent. of the water delivered into the mains by the city waterworks was being paid for, ordinance No. 305 was passed by the city council, requiring meters on all water lines, save as therein provided. Accordingly, on November 17, 1910, a Hersey detector meter was installed on the defendant's sprinkler line, and a 28-hour test revealed that the defendant was receiving a much larger amount of water than it was paying for, and that the conditions during this 28-hour period were no different than they had been before that time. Immediately thereafter the fire pump was dismantled and repaired, and the taps on the sprinkler system disconnected. An investigation was made by city officials which revealed that the pressure pump gauge showed a pressure equal to the city pressure. But, when the city main was suddenly cut off, the gauge on the defendant's pressure pump dropped from 68 pounds to 5 pounds. A further investigation by a council committee followed, in which it was found that the defendant was taking city water in the three ways hereinbefore described. It is the plaintiff's claim, and evidence was presented tending to show, that the defendant's pressure pump was a mere blind, and that it never did maintain a pressure equal to or greater than the city pressure.

On the other hand, it was claimed by the defendant that the taps had been put on the sprinkler system

by its mechanics for their own convenience, and without the knowledge of the defendant; that its pump maintained a pressure greater than the city pressure up to a short time prior to the suit; and that up to said time no city water was drawn from the taps. It was also claimed by the defendant that the water was taken from the 2-inch by-pass on the 21½-inch line openly, with the constructive knowledge of the plaintiff's inspector; also that, at the time the Hersey meter was read, the pressure pump was down for repairs, and there was a large leak in the basement, causing a large temporary waste of water; that the flow during the 28 hours during which the test was being made was unusual, and therefore not a fair basis on which to estimate the amount used in four years.

The evidence in support of these claims being submitted to a jury, a verdict was found for the plaintiff in the sum of \$15,840.76, and judgment was entered thereon by the court. Defendant's motion for a new trial was overruled. The cause being removed here by writ of error, the assignments of error are grouped by counsel for convenience as follows:

"(1) Errors in the ruling of the court during the trial and errors in rulings on misjoinder of assumpsit and tort counts.

"(2) The error committed by the court in permitting a statement or account, not an exhibit in the case, prepared by plaintiff's counsel, of plaintiff's claim, to be taken to the jury room.

"(3) Improper arguments of counsel.

"(4) Errors in the court's charge and refusals to charge.

"(5) Excessive verdict."

The declaration of the plaintiff contains six counts. It is appellant's claim that the first four counts are all in assumpsit, and the last two are in tort, and that these two actions cannot be joined, and the plain-

tiff must elect. The plaintiff does not dispute the latter contention, but says that the first three counts are purely counts in trespass on the case, and the last three are in trover. The claim that the counts are in assumpsit is urged because of the fact that ordinance No. 197 of the city of Kalamazoo, with relation to the waterworks, is set forth in these counts, and that in effect a contract relation between the parties is alleged. The plaintiff's claim is that the defendant, without any regard for the ordinance, took water wrongfully and unlawfully. It appears, from a reading of these counts, that the ordinance is set forth for the purpose of showing that the conduct of the defendant in this case was unlawful, unauthorized, wrongful, and in violation of the law of the city of Kalamazoo; which makes these counts sound in tort instead of in contract. In the case of *Dillon v. Craig*, 168 Mich. 216 (132 N. W. 1041), relied upon by the defendant, the declaration showed a contract obligation, and there was no statute or ordinance which made the violation of the contract tortious. There is no merit to appellant's contention as to a misjoinder of counts.

During the final argument of plaintiff's counsel, in the discussion of the question of damages, two typewritten computations which had been prepared were handed to the jury, showing how the plaintiff estimated its damages. The statements were as follows:

First Statement.

HERSEY METER.

27,144 cubic feet in 24 hours.

27,144x365 days equals 9,907,560 cubic feet per year.

9,907,560x4 years equals 39,630,230 cubic feet.

Water rates are:

\$1.00 for each 1,000 cubic feet up to 3,000.

.80 for each 1,000 cubic feet from 3,000 to 10,000.

.60 for each 1,000 cubic feet over 10,000.

3,000 cubic feet at \$1.00 equals.....	\$3 00
7,000 cubic feet at .80 equals.....	5 60
39,620,230 cubic feet at .60 equals.....	23,772 14
	\$23,780 74
Take out \$444.93 paid by defendant.....	444 93
	.\$23,335 81
Add interest at 5 per cent. from November 17,	
1910, 1 year, 2 months, and 25 days, equals..	1,442 25
	\$24,778 06

Second Statement.

May 17, 1909, got third machine working.	
May 17, 1909, to November 17, 1910, equals 18 months.	
That leaves out of the 4 years, 30 months, defendant had two machines.	
With 3 machines defendant used 1,500,000 gallons.	
With 2 machines defendant used 1,000,000 gallons.	
27,144 cubic feet for 24 hours equals 9,907,560 cubic feet per year, or 14,861,340 cubic feet for 18 months, using in the mill 1,500,000 gallons per day.	
2 machines used 1,000,000 cubic feet in 24 hours, or two-thirds as much water as the 3 machines.	
Two-thirds of 9,907,560 equals 6,605,040 per year.	
30 months equals 2½ years.	
6,605,040x2½ equals 16,512,600.	
Add together what 3 machines used in 18 months and what 2 machines used in 30 months:	
14,861,340 plus 16,512,600 equals 31,373,940 cubic feet.	
3,000 cubic feet at \$1.00 equals.....	\$3 00
7,000 cubic feet at .80 equals.....	5 60
3,136,940 cubic feet at .60 equals.....	18,818 36
	\$18,826 96
Take out \$444.93 paid by defendant.....	444 93
	\$18,382 02
Interest at 5 per cent. from November 17, 1910,	
1 year, 2 months, 25 days.....	1,136 03
	\$19,518 06

These statements were read in open court in the presence of counsel. An examination of these statements shows that they are nothing more or less than

computations in arithmetic, based on facts claimed to have been proved by the plaintiff in the case. When the jury was about to retire, plaintiff's counsel called the court's attention to the fact that some of the statements were still in the hands of the jury, and said with reference thereto:

"It is simply a computation, as claimed by the plaintiff, as to the amount of damages along the two lines mapped out on that paper. We claim it is for the consideration of the jury the same as any other fact in the case, not binding, but that they may consider it in arriving at their verdict. We have no objection to the jury taking that to their jury room, and, if the other side have some figures they wish to give to the jury, we have no objection."

It is claimed that these statements were never given to defendant's counsel for examination. The record does not show that copies were requested, and counsel must have heard the contents thereof as they were read to the stenographer. Counsel was unquestionably entitled to copies, and undoubtedly such copies would have been furnished, if a request had been made.

It is urged that allowing the jury to take the memoranda to the jury room was error, under the decision of this court in *Harroun v. Railway Co.*, 68 Mich. 208 (35 N. W. 914). It seems to be clear that, according to the rule announced in that case, the practice followed in the instant case is not to be commended, and that it was improper for the court to allow these memoranda to be taken into the jury room without the consent of the opposing counsel. We are of the opinion, however, that the defendant was not prejudiced thereby, as the verdict of the jury was in a sum considerably less than the amounts claimed in the computations.

In his charge the court gave the following:

"(5) I instruct you that the plaintiff has called

the following witnesses: Alexander Clark, William Wilhelm, Fred Phetteplace, Jason Spade, Jeremiah Linehan, Frank Handy, William Hewitt, Walter Jones, Perry Norman, Warren Johnson, William Gaylor, Ernest Shepard, and George Harvey, under Act No. 307 of the Public Acts of Michigan for the year 1909, which provides as follows:

“An act to authorize parties litigant, when they call as witnesses in their behalf the opposite party, employee, or agent of said party, to cross-examine such witnesses, and providing that they shall not be bound by their answers.

“*The people of the State of Michigan enact:*

“SECTION 1. Hereafter in any suit or proceeding in any court of law or equity in this State, either party, if he shall call as a witness in his behalf the opposite party, employee or agent of said opposite party, or any person who, at the time of the happening of the transaction out of which such suit or proceeding grew, was an employee or agent of the opposite party, shall have the right to cross-examine such witness the same as if he were called by the opposite party; and the answers of such witness shall not interfere with the right of such party to introduce evidence upon any issue involved in such suit or proceeding, and that the party so calling and examining such witness shall not be bound to accept such answers as true.”

“That is the end of section 1. And in so calling said witnesses, or any of them, the plaintiff is not bound by the answers given by said witness or witnesses, nor is said plaintiff bound to accept the answer or answers of any one or ones of said witnesses as being true answers, and the plaintiff may accept such part or parts of the answers of any one or ones of said witnesses as the plaintiff elects so to accept, and, so far as the plaintiff is concerned, such of said answers, if any, which the plaintiff does accept as being true, are for the consideration of the jury the same as any other facts or circumstances in the case.”

With reference thereto, counsel for appellant says in his brief:

“While the plaintiff is not bound to accept the answers as true, if the answers stand uncontroverted, they stand as facts in the case, and just exactly with

the same force and effect as if they had been sworn to by any other witness in the case, admitting, of course, the jury's right to consider the credibility of such witnesses, but the judge said that the plaintiff need not accept anything which was adverse to it, and that they were only to consider such things as were favorable to the plaintiff. In other words, only consider such things as the plaintiff did accept."

It is also claimed that by this instruction the trial court swept aside and eliminated from the case some of the most valuable testimony of the defendant as to the capacity of the pressure pump, as several witnesses called under this statute had given testimony with reference thereto.

It is true that this instruction of the court, taken by itself, in explaining to the jury the effect of the statute, was somewhat incomplete and confusing. However, the court did not say that any testimony that was favorable to the defendant, and which plaintiff did not accept, was not for the consideration of the jury, and in this connection the following instruction of the court given to the jury should be considered:

"(4) And I further instruct you that any statements or testimony submitted by the defendant, or any employee or former employees of the defendant called by the plaintiff as to the condition of this pump during the entire four years mentioned in the plaintiff's declaration, is not necessarily to be taken as true, but should be considered by you, and you are to determine the condition of this pump during said period and the question of whether or not it did actually maintain the pressure claimed by the defendant by all of the facts and circumstances and testimony left in this case for your consideration."

In our opinion, this instruction, taken in connection with the other, made it clear to the jury that they must consider all the testimony in the case, and there was not eliminated from their consideration such testimony favorable to the defendant, given by witnesses called

under the statute, which had not been accepted by the plaintiff. See *Jones v. Railroad Co.*, 168 Mich. 14 (133 N. W. 993); *Johnson v. Carbide Co.*, 169 Mich. 659 (135 N. W. 1069).

The court charged:

"If you believe that these taps or connections did exist ahead of the meter, and that the water passing through these pipes was not registered by the meter, then I instruct you, gentlemen of the jury, that any water taken through such pipes by the defendant company was taken wrongfully and unlawfully, and your verdict should be for the plaintiff, the city of Kalamazoo, in the amount of the value of the water so wrongfully taken, to be determined by you, as I shall hereafter instruct you, even if the defendant's officers, directors, and stockholders, any or all of them, did not know water was being so used by the defendant."

And it is contended that no verdict should be rendered against the company unless the fact of the wrongful and unlawful taking of the water is brought home to some officer of the corporation. In this case, there being evidence to warrant the jury in finding that the defendant established the sham pressure pump and the improper openings on the sprinkler system, it is not unreasonable to assume that the wrongful means were installed to take the plaintiff's water without metering and paying for it. By so doing, the defendant invited its employees to use the unlawful means for the unlawful purpose. As is said by counsel in his brief:

"This is a case of the employee using the means furnished by the employer to accomplish an unlawful purpose in furthering the master's interests, and out of which nobody but the master received the benefit."

Cooley, in his work on Torts (3d Ed.), vol. 2, p. 1017, says:

"The master is liable for the acts of his servant, not

only when they are directed by him, but also when the scope of his employment or trust is such that he has been left at liberty to do, while pursuing or attempting to discharge it, the injurious act complained of. It is not merely for the wrongful acts he was directed to do, but the wrongful acts he was suffered to do, that the master must respond."

See, also, 31 Cyc. pp. 1582-1585.

There was no error in the charge as given.

If entitled to damages (and a reading of this record is convincing that the jury were warranted in finding that unmetered water was taken by the defendant's servants and employees for the use and benefit of the defendant, for which the defendant did not pay), the damages should be the full value of the property at the time of conversion, together with interest on that value from that time. It is clearly impossible for the plaintiff to prove, with absolute certainty, the amount of water the defendant converted, and this want of certainty is properly attributable to the fault of the defendant. The claims made by the plaintiff were for the highest amount of water which could possibly have been used by the defendant by means of the unlawful taps and by-passes. The defendant sought to reduce this by attempting to show that such an amount of water could not have been and was not taken from the city's mains as alleged. Taking the water in the way it did, the defendant must bear the risk of uncertainty thus produced. *Allison v. Chandler*, 11 Mich. 542; *Gilbert v. Kennedy*, 22 Mich. 117; *Krumenaker v. Dougherty*, 74 App. Div. (N. Y.) 452 (77 N. Y. Supp. 467).

We are satisfied that a large amount of unmetered water was taken by the defendant, and, while the amount taken must be necessarily an approximation based on the test made by the Hersey meter and all the other facts and circumstances shown in the case,

we are not convinced that the amount found by the jury is excessive.

During the closing argument of plaintiff's counsel an exception was taken by defendant's counsel, as follows:

"*Mr. Irish*: I will take an exception to counsel talking about stealing water.

"*The Court*: I think the argument may proceed that has been indulged in by the other side as a matter of law. I will charge the jury about its weight.

"*Mr. Irish*: An exception."

The trial court, in charging the jury with reference to this, said:

"The jury are instructed that, under the declaration as it now stands, they are not to consider the question as to whether the Standard Paper Company or any of its agents have been guilty of stealing water. There can be no stealing or larceny of the water, unless the elements of larceny or stealing are charged in the declaration and proven in this case. No larceny is charged or proven in this case. I will not say proven."

An examination of the excerpts from the arguments of defendant's attorneys shows that the statement of the trial judge is justified, and it appears that language with reference to the stealing of water had been used by the attorneys for the defense in their argument. Although the question of the stealing of the water was not in the case, having been made prominent and commented upon by defendant's attorneys in their arguments, there was no prejudicial error in plaintiff's attorney's using the same language in his reply. *People v. Swift*, 172 Mich. 473 (138 N. W. 662). We are not satisfied that the argument contributed to the result. *Houser v. Carmody*, 173 Mich. 121 (139 N. W. 9).

Criticism is also made that the trial judge unduly emphasized plaintiff's claim in his charge, but a care-

ful reading of the entire charge is satisfying that the questions in issue were fairly submitted to the jury.

Finding no prejudicial error in the record, and being convinced that the verdict finds support in the evidence in the case, the judgment is affirmed.

MCALVAY, C. J., and BROOKE, KUHN, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

BROWN v. HADWIN.

1. FALSE IMPRISONMENT — PROCESS—CRIMINAL LAW—WARRANT—INTOXICATING LIQUORS.

Although a warrant for selling intoxicating liquor in a county which has prohibited the traffic should be based on a complaint that states the name of the person or persons to whom the unlawful sales were made, and though such complaint is insufficient, upon direct attack, if the name of the purchaser is not stated, the process may be sufficient to protect an officer who arrests the offender, in an action of false imprisonment and malicious prosecution.¹

2. SAME—SHERIFF—INTOXICATING LIQUORS—ARREST.

To protect an officer in making an arrest, the process must be fair upon its face; that is, it must apparently be lawfully issued and such that the officer might properly serve it; not necessarily that it appear to be perfectly regular and in most approved form. It must appear that the process proceeds from a court which had authority in law to issue process of that nature, that it is legal in form, and on its face contains nothing to apprise the officer that it was issued without authority.

¹ For the liability of an officer making arrest, see notes in 51 L. R. A. 193, and 42 L. R. A. (N. S.) 69.

3. **SAME.**

Where the complaint charged an offense which the justice could not try, the examination being held before him and the names of the persons to whom liquor was unlawfully furnished being liable to be disclosed so that the omission could be corrected in the information, the process was not absolutely void, and sufficiently protected the officer who arrested plaintiff.

4. **SAME—JUSTICES OF THE PEACE—JUSTIFICATION.**

Failure to sustain a complaint made on the information of the complaining witness, a sheriff, by introducing before the justice who entertained it the testimony of other witnesses who had knowledge of the facts, is fatal to the jurisdiction of the justice.

5. **SAME—WARRANT.**

A warrant reciting that witnesses had been examined before the justice of the peace who issued it, on its face justified the issuance of a warrant, and conferred jurisdiction even if the testimony of corroborating witnesses was not reduced to writing: the officer is not required to look behind his process or to examine the complaint or other preliminary process.

6. **SAME—ISSUES.**

The trial court did not err in refusing to submit to the jury the issue whether the sheriff had in his possession the warrant for defendant's arrest at the time he took the latter into custody, where the prosecuting attorney and sheriff both testified that the process was in the sheriff's hands and defendant could not swear positively to the contrary.

Error to Iosco; Connine, J. Submitted April 28, 1914. (Docket No. 155.) Decided October 2, 1914.

Case by Crosby Brown against George H. Hadwin for false imprisonment. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

Edwin Rawden and C. H. W. Snyder, for appellant.
Albert W. Black, for appellee.

KUHN, J. This action was originally begun for

malicious prosecution and false imprisonment. The count for malicious prosecution was withdrawn by the plaintiff at the opening of the trial of the case, which left the action one for false imprisonment alone. The plaintiff, who resides in Saginaw, was arrested at Tawas City, to which place he had been brought by a subpoena commanding him to appear before William B. Kelly, one of the justices of the peace in and for Iosco county, to testify in a criminal case. The complaint and warrant, drawn by the prosecuting attorney, charge him with a violation of the local option law. He was committed to jail, and was discharged on the day set for his examination, on request of the prosecuting attorney, without any examination being held. The complaint, which was made by the defendant herein, and the warrant show that the complaint is made on information and belief, and no one with any knowledge of the facts was sworn in support thereof before the warrant was issued. At the close of the proofs a verdict was directed for the defendant by the trial court. There are five assignments of error, which relate to two questions:

First, those relating to the court's ruling that the warrant and commitment issued protected the officer; *second*, that the court erred in not submitting to the jury the question of fact as to whether or not the sheriff had a warrant when the arrest was made.

It is the contention of the plaintiff and appellant that the warrant was absolutely void on its face, and therefore no protection to the defendant when he served it on the plaintiff, and did not protect him in making the arrest and keeping him in custody, because the commitment follows the warrant and contains the same claimed defects as the warrant. In this connection the first proposition urged is that the offense was not properly stated in the complaint, warrant, and commitment. The complaint charges the

plaintiff with having at a certain time and place sold, furnished, given away, and delivered a certain quantity of malt, brewed, fermented, and intoxicating liquor, to wit, whisky, and otherwise charges a violation of the local-option law, which it is conceded was in effect at the time in Iosco county. It does not, however, state the name of the person or persons to whom it is charged the plaintiff sold, furnished, and delivered the liquor, and the failure to allege this, it is claimed, makes the complaint and subsequent proceedings void; and the cases of *People v. Minnock*, 52 Mich. 628 (18 N. W. 390), *People v. Heffron*, 53 Mich. 527 (19 N. W. 170), and *People v. Keefer*, 97 Mich. 15 (56 N. W. 105), are relied upon. The general rule as to what constitutes a sufficient warrant so as to protect the officer who serves it is stated in 2 Cooley on Torts (3d Ed.), p. 883, as follows:

"The process that shall protect an officer must, to use the customary legal expression, *be fair on its face*. By this is not meant that it shall appear to be perfectly regular, and in all respects in accord with proper practice, and after the most approved form; but what is intended is that it shall apparently be process lawfully issued and such as the officer might lawfully serve. More precisely, that process may be said to be fair on its face which proceeds from a court, magistrate, or body having authority of law to issue process of that nature and which is legal in form, and on its face contains nothing to notify or fairly apprise the officer that it is issued without authority. When such appears to be the process, the officer is protected in making service, and he is not concerned with any illegalities that may exist back of it."

In the cases cited the attack on the proceedings was a direct one, and not made in a collateral proceeding, and it is true that in such a direct attack a warrant might be held invalid and still be sufficient protection to the officer and parties for any arrest made thereunder. *Wheaton v. Beecher*, 49 Mich. 348 (13

N. W. 769). To protect the officer it must appear, as stated in *Cooley on Torts, supra*, that the process proceeds from a court having authority of law to issue process of that nature, that it is legal in form, and on its face contains nothing to notify or fairly apprise the officer that it is issued without authority. In the instant case a proper rule of pleading had been violated, as the complaint and warrant were not specific enough to give the respondent proper notice, and on motion to quash in a direct attack the complaint would necessarily have been held insufficient as a pleading. The proceeding was not one triable by the justice, and the respondent was entitled to an examination. In this examination the proofs would have disclosed the name of the party to whom it was claimed the liquor was furnished or sold. The respondent could not plead guilty until an information had been filed against him in the circuit court, and in such information the name of the person to whom the liquor was sold might have been stated, as the information is based on the preliminary proceedings, and the technical defect in the complaint thus remedied. *People v. Pichette*, 111 Mich. 461 (69 N. W. 739); *People v. Stockwell*, 135 Mich. 341 (97 N. W. 765).

There is no question that the process in the instant case issued from a court having authority of law to issue such process, and that the process was legal in form, and we are of the opinion that the failure to allege to whom the liquor was furnished or sold is not such a defect as to notify or fairly apprise the officer that it was issued without authority. As was said by Justice MARSTON in *Wheaton v. Beecher*, 49 Mich., at pages 350, 351 (13 N. W. 769):

"An officer to whom a criminal warrant is delivered by a magistrate may be indicted for refusing to serve or return the same. 1 Bish. Crim. Law, § 350. If no cause or an insufficient cause appear therein and the

person accused resists and kills the officer, then, according to the extent of the authority of the officer his death may be murder, manslaughter, or perhaps justifiable homicide. *Hoye v. Bush*, 1 M. & G. 775, cited in *Drennan v. People*, 10 Mich. 183.

"The officer is not bound to look behind a regular warrant coming from a proper jurisdiction.

"In many cases it must be exceedingly difficult for the officer or his advisers to determine whether a warrant is or is not defective upon its face, and in view of the peculiar position in which the officer is placed, in all such cases he cannot be held liable in a civil action for damages, for making the arrest."

See, also, *Gardner v. Couch*, 137 Mich. 358 (100 N. W. 673, 101 N. W. 802, 109 Am. St. Rep. 684); *Leger v. Warren*, 62 Ohio St. 500 (57 N. E. 506, 51 L. R. A. 193, and note, 78 Am. St. Rep. 738); *City of Lawton v. Harkins*, 34 Okl. 545 (126 Pac. 727, 42 L. R. A. [N. S.] 69, and note).

The complaint shows upon its face that it was made on the information and belief of the complaining witness, the defendant herein. It appears affirmatively from his testimony that no other witnesses were sworn before the warrant was issued. The failure to support the complaint by the examination of other witnesses was fatal to the jurisdiction of the justice to issue the warrant. In *People v. Heffron*, 53 Mich. 527, 529, 530 (19 N. W. 170), where the complaint was made on information and belief, the following is stated:

"This affidavit, within the repeated rulings of this court, as well as the most elementary principles of criminal law, is entirely insufficient to confer any jurisdiction upon the justice to issue a warrant for the arrest of the respondent. Bish. Cr. Pro. §§ 716-719; *Commonwealth v. Lottery Tickets*, 5 Cush. [Mass.] 369; *Brown v. Kelley*, 20 Mich. 27; *People v. Wayne Circuit Judge*, 36 Mich. 334; *Swart v. Kimball*, 43 Mich. 451 [5 N. W. 635]. The complaint must set up the facts constituting the offense on the *knowledge* of

the person making the complaint, and if he does not know them, other witnesses must be examined who do know them; and no person can be arrested on the mere belief of the person making the complaint. The liberty of the citizen is not held upon so slender a tenure as that. *Badger v. Reade*, 39 Mich. 774; *People v. Recorder of Albany*, 6 Hill [N. Y.], 429; *Proctor v. Prout*, 17 Mich. 473."

When the warrant recites that an examination has been had of witnesses, the court will presume that sufficient appeared to justify the issuance of a warrant and confer jurisdiction, even if the testimony has not been reduced to writing. *People v. Bechtel*, 80 Mich. 623 (45 N. W. 582); *Curnow v. Kessler*, 110 Mich. 10 (67 N. W. 982). In the instant case no examination is claimed by the justice, no recital of it is made in the warrant, and the contrary appears affirmatively from the evidence of the defendant, who made the complaint that no witnesses were sworn at the time the warrant was issued. The warrant issued was nevertheless fair on its face, and this proceeding against the process server is an action of false imprisonment alone. In such an action this court has not required the officer to look behind the process. In serving the process he has a right to rely on the warrant, and is not compelled to examine the complaint or other preliminary proceedings. *Wheaton v. Beecher*, *supra*.

We are of opinion that the trial judge properly refused to submit to the jury the question as to whether or not the defendant had the warrant at the time the arrest was made. The prosecuting attorney, who prepared the complaint and warrant prior to the arrest of the plaintiff, testified that he saw the paper, meaning the warrant, in the hands of the sheriff at the time the arrest was made. The defendant testified positively that he had the warrant at the time. Against

this there was no positive or direct testimony, and the plaintiff on cross-examination stated:

"Q. Can you now positively swear under oath that he did not have a paper in his hands at the time he arrested you?

"A. No; I could not positively swear that he did not.

"Q. So that, as a matter of truth, you are not certain now as to whether he had a warrant in his hand or not?

"A. No; he might have had. I did not take the time to look at his hands."

There was no evidence of such a nature as to justify submitting this question to the jury.

Judgment is affirmed.

MCALVAY, C. J., and BROOKE, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

WATERMAN-WATERBURY CO. v. SCHOOL DISTRICT NO. 2
OF THE TOWNSHIP OF WYOMING.

1. EVIDENCE — SIMILAR CONDITIONS — CONTRACTS — SALES — WARRANTY — BREACH OF CONTRACT.

On the trial of an issue of breach of warranty that a furnace installed by plaintiff would properly heat a school-house in the coldest weather, plaintiff was entitled to introduce testimony tending to prove that other similar heating plants heated the buildings in which they were placed satisfactorily if they were properly operated.

2. SAME—AFFIRMATIVE DECREE—BURDEN OF PROOF—WARRANTY OF FITNESS.

The burden rests upon a defendant, in an action for the price of a furnace, to establish that the article failed to conform to the guaranty of plaintiff, who warranted that it would give satisfactory results, after it had been installed and accepted under the contract.

Error to Kent; McDonald, J. Submitted June 3, 1914. (Docket No. 8.) Decided October 2, 1914.

Assumpsit by the Waterman-Waterbury Company against School District No. 2 of the township of Wyoming for the price of a furnace. Judgment for defendant. Plaintiff brings error. Reversed.

Cummins, Nichols & Rhoads, for appellant.

Louis T. Herman, for appellee.

BROOKE, J. The parties entered into the following contract:

"THE WATERMAN-WATERBURY COMPANY,
"Lansing, Michigan.

"*Gentlemen*:

"Please install in our schoolhouse, in district No. 2, township of Wyoming, county Kent, State of Michigan, one Waterbury heating and ventilating system, style C, size 24, for which on January 10, 1913, we agree to pay the sum of \$120 or issue a school warrant on January 10, 1913, drawing 6 per cent. interest.

"We agree to transfer the Waterbury system from the freight depot to the schoolhouse, to furnish a man to assist the regular setter in installing the Waterbury system, and to see that the doors, windows, ceilings, etc., are reasonably tight, when such repairs are found necessary to the proper heating and ventilating of the schoolroom.

"The Waterman-Waterbury Company guarantee that this system will be constructed of first-class material, the same as described in the catalog, and manufactured in a careful, workmanlike manner free from defective material.

"The Waterman system is further guaranteed, with proper care in operation, to heat the schoolroom to 70 degrees during the coldest weather and to provide good ventilation during school hours.

"ZACK VAN DAM, Director.

"PETER KELDER, Moderator.

"HENRY DEKER, Treasurer.

"Date May 27, 1912.

"Given at meeting of school board."

Under this contract the plaintiff installed a heater in the schoolhouse of defendant, being assisted in the installation by Henry Deker, defendant's treasurer. On July 31st, after installation, the job was accepted as follows:

"Folio No. 1097. Co., Kent, Twp., Wyoming. Dist. No. 2. Director, Zack Van Dam. Address, Grand Rapids, No. 8 Tel. Treasurer, Henry Deker. Address, Grand Rapids, No. 8 Tel. Moderator, Peter Kelder. Address, Grand Rapids, No. 8 Tel. Director lives $\frac{1}{4}$ mile east of schoolhouse. Location of schoolhouse. Take Holland interurban to Wyoming Park, then $1\frac{1}{2}$ miles from station. On diagram show location of chimney, doors, teacher's desk, plant and wall through which intake enters. Construction frame. Shipped to Zack Van Dam. Sta., Grand Rapids, via.—Style C. Size 24. Was anything missing? Remarks: Building to be repaired and storm porch put on.

"The workmanship on this job is satisfactory to me.

"HENRY DEKER, Treasurer.

"July 31, 1912.

"E. L. GRIFFITH, Setter."

Thereafter, during the winter of 1912-13, the heating plant was used to some extent by the defendant. Under a claim that it did not operate satisfactorily, the defendant refused to pay therefor, and the plaintiff thereupon brought suit. Defendant filed a plea of the general issue, and gave notice thereunder that defendant would seek to recoup damages against plaintiff for a breach of the warranty contained in the contract in the sum of \$300; the balance over and

above the claim of the plaintiff to be certified in favor of defendant. Under these pleadings, the defendant recovered a verdict against plaintiff of \$75. Judgment having been entered thereon, plaintiff reviews the case in this court by writ of error, raising two questions only.

The first question is covered by assignments of error numbered 1, 2, 3, and 4, and relates to the ruling of the circuit court to the effect that plaintiff could not show that other apparatus, similar in character to the one which plaintiff had sold defendant, when properly operated, satisfactorily heated the buildings in which they were installed. Bearing in mind that it was the contention of the defendant that, though properly operated in accordance with the instructions of the plaintiff, the heater would not heat the defendant's schoolhouse in accordance with the terms of the guaranty, and that the plaintiff claimed that any failure of the heater to give the requisite service was attributable solely to a failure on the part of the defendant to properly operate the same, we are of opinion that this testimony was admissible. *Avery v. Burrall*, 118 Mich. 672 (77 N. W. 272); 17 Cyc. p. 289.

The second point raised by the plaintiff is that the court erred in instructing the jury as to the burden of proof. Upon this question the plaintiff submitted the following request:

"Gentlemen of the Jury: On the question whether or not the express warranty contained in the contract has been broken, on this branch of the case the burden of proof is upon the defendant. The defendant must prove, by preponderance of evidence, that the plaintiff has broken its warranty, and that the defendant has suffered damages thereby. If you find, considering all the evidence that has been introduced on this part of the case, that the defendant has failed to establish, by a preponderance of the proof, that the plain-

tiff has broken its warranty, then you will find for the plaintiff the amount of its damages which would be the purchase price of the furnace. Now this involves proof of these propositions, which are included in the condition of the warranty:

"First. Whether the material and workmanship used in the construction of this heating plant were of the best of their respective kinds, and that the installation was performed in a workmanlike manner.

"Second. Whether the apparatus, as a whole, was capable of warming the schoolroom to a temperature which the guaranty provided when the proper fuel was used and the furnace was properly managed.

"Now, if neither one of these propositions has been established by a preponderance of evidence, you should consider that the defendant has failed to establish its contention upon this branch of the case, and you should find for the plaintiff the amount that is due it under the contract, the purchase price of the furnace."

The court refused to give this request, but instead charged the jury as follows:

"Many of the facts are not in dispute. The contract between the parties is in writing, and its terms and provisions are therefore not in dispute. It is not disputed that the plaintiff installed the Waterbury heating and ventilating system of the style and size mentioned in the contract. It is not disputed that the furnace was constructed of first-class material, as required by the contract. The claim in dispute is as to the efficiency of the system to maintain in the coldest weather, with proper care in operation, a temperature of 70 degrees. Under its contract the plaintiff was required to install a heater that would heat the schoolhouse to 70 degrees during the coldest weather, provided proper care was used in its operation. Now the plaintiff claims that it has installed a furnace of such efficiency; the defendant says it has not. You will determine from the evidence what the facts are. Did it maintain a temperature of 70 degrees? Was proper care used in the operation of the furnace? If the furnace, properly operated, would not heat the schoolroom to 70 degrees during the coldest weather, and when I use the term 70 degrees, it is used as under-

stood and explained to you by counsel. Substantially 70 degrees is a proper heat, proper temperature for a schoolroom, and that was what the parties contemplated. If the furnace, properly operated, would not heat the schoolroom to 70 degrees during the coldest weather, then it was not such a furnace as the plaintiff contracted to furnish, and the plaintiff would not be entitled to recover the purchase price, under the circumstances of this case. If, on the other hand, the furnace, properly operated, would maintain a temperature of 70 degrees during the coldest weather, then the plaintiff would be entitled to recover the purchase price which was fixed by the contract at \$120. (So, before the plaintiff is entitled to recover in this case, it must convince your minds, by a fair preponderance of the evidence, that it complied with its contract by furnishing a furnace that would, if properly operated, maintain a temperature of 70 degrees in the coldest weather.) If you find that the plaintiff did furnish such a furnace, your verdict should be for the plaintiff in the sum of \$120 and interest. If you find that it did not furnish such a furnace, your verdict should be no cause of action, unless you also find that the defendant has suffered damages by reason of the plaintiff's failure to comply with its contract, in which case you will render a verdict for such damages as the evidence shows it has suffered. These damages, the defendant claims, amount to \$75. The plaintiff claims, if you find for the defendant damages, such damages would not exceed \$19.59. On this question of damages claimed by the defendant, the burden of proof is upon the defendant to show its damages by a fair preponderance of the evidence."

In a case like the present, where the article contracted for was delivered by the plaintiff and accepted by the defendant as in accordance with the contract and warranty, and the defendant relies upon an affirmative defense, it is clear that the burden of proof rests upon the defendant to establish the defense relied upon—in this case a breach of the warranty as to what the furnace would do under proper care in opera-

tion. *Keystone Manfg. Co. v. Forsyth*, 123 Mich. 626 (82 N. W. 521); *Avery v. Burrall*, *supra*; 35 Cyc. p. 457.

Judgment reversed, and a new trial ordered.

MCALVAY, C. J., and KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred. OSTRANDER, J., did not sit.

JACKSON v. SCHILLINGER BROS. CO.

1. MASTER AND SERVANT — NEGLIGENCE — INCOMPETENCY—FELLOW-SERVANTS—NOTICE.

Evidence that plaintiff's fellow-servant behaved like a boy, smoked cigarettes, was inattentive to his work and engaged in joking and talking, did not establish incompetency to do unskilled labor; and the employer was not required by law to give instructions or inquire into the experience or competency of men to do that kind of work.¹

2. SAME—EVIDENCE OF NOTICE—ACTUAL NOTICE.

Nor did a warning by one of the workmen to defendant's foreman that there would be an accident if he retained the inattentive employee, not stating his reasons or specifying why he considered the laborer incompetent, put the employer upon notice of the alleged incompetency.

3. SAME—RISKS ASSUMED.

And where plaintiff had worked for upwards of two days within ten feet of the fellow-servant, without observing anything to indicate incompetency, he must be held to have had equal knowledge of the facts with the employer, and was chargeable with the assumption of the risk of the negligence of his coemployee.

¹ For the master's duty as to selection, employment and retention of fellow-servants, generally, see note in 48 L. R. A. 369. And upon the liability of a master for injuries caused by incompetency of a fellow-servant, see note in 25 L. R. A. 710.

Error to Menominee; Flannigan, J. Submitted June 5, 1914. (Docket No. 26.) Decided October 2, 1914.

Case by George Jackson against Schillinger Bros. Company for personal injuries. Judgment for plaintiff. Defendant brings error. Reversed.

Fred H. Haggerson and McCaskill & McCaskill, for appellant.

Michael J. Doyle, for appellee.

The defendant is an erecting company, and in August, 1911, was engaged in erecting a building for a brewery in the city of Menominee, Mich. The floors and ceiling of this building are concrete, and in doing the work it became necessary to put up certain forms under the ceiling, into which the concrete was poured, and which remained there until the concrete became set, after which the forms were removed and again used for the same purpose on the next floor above. The forms were in sections, each section being about 12 feet long, made of boards, and weighing about 70 pounds. The method employed for taking the forms down was to erect a scaffold about 14 feet from the floor, which left a space between the floor of the scaffold and the ceiling of about 5 feet. The scaffold consisted of three horses upon which were laid two planks 14 inches wide. It was the duty of the workmen to mount the scaffold, cut the wires which held the planks supporting the forms, and then take down the forms section by section. After the wires were cut and the plank removed the forms would still remain in place, sticking to the concrete. The men would then take cold chisels and hammers and pry the edges of the forms loose from the concrete, after which it could be removed. The plaintiff, a competent carpenter of some years' experience, was instructed to take down

these forms. After working at this for a short time with another carpenter by the name of Muchinsky, Muchinsky was sent to the floor above to re-erect the forms as they were taken down, and two boys or young men were placed upon the platform to assist plaintiff in the work. Plaintiff continued with this help to remove the forms for $2\frac{1}{2}$ days or more, when the accident happened upon which he bases his suit. He testified that, having removed the wires and planks from a given form and while in the act of stooping over to pick up his hammer and chisel from the platform, he heard one of the boys, Fred Weimer by name (the other boy having shortly before that time left the platform) strike the form a blow, upon which, as he straightened up, the form fell, striking him in the breast, knocking him to the floor and causing him to sustain certain injuries for which he seeks compensation.

The sole grounds of negligence relied upon by plaintiff are that defendant employed an incompetent workman in the person of Weimer, that defendant knew, or should have known, of such incompetency, and that defendant retained Weimer in its service after said notice which is alleged to have been received by defendant before the injury. Upon the question of Weimer's incompetency and notice to the defendant, the following testimony was given by the witness Muchinsky, who, as before stated, preceded Weimer upon the scaffold in assisting plaintiff to remove the forms, and when Weimer and the other boy took his place, he proceeded to erect forms upon the floor above. It was apparent, however, that he was back and forth from time to time in the room where the forms were being removed.

"The first time my attention was attracted to him was on the concrete. He was wheeling concrete. When I saw him doing his work wheeling, he was smoking

cigarettes off and on, and rolling cigarettes, and when I went by him he was talking to me and giggling and laughing also. When I first saw him he was working more in a fooling way instead of a man that ought to pay attention to the work. He done more as a boy would. He was making cigarettes, and he would smoke the cigarettes, that is, on the concrete. He would take a little time and stop from working and make the cigarettes. I have seen him a few times a day, I do not know how many or how often he did it. I saw him wheeling concrete with a wheelbarrow. When he had a load on, of course, he was wheeling the same as anybody else would, and when he hadn't a load on he was, it seems, more in a jolly way. He did not run with it straight as a man would. Maybe that was his way of doing it. I noticed his actions while he was hauling concrete with regard to the other men. They were fooling together. I had occasion to pass them frequently. I remember once he asked me if I didn't want a bottle of beer. It is a quite a while ago, and I don't remember everything. That was during his work. That occurred only once I remember of. I know when they used to bring the case in he would go himself and get one or two extra bottles and hide them. I saw him at work on the scaffold. He conducted himself more like fooling as much as I seen than he was at work. I remember that he had a cold chisel in one hand and a hammer in the other, and he was holding the cold chisel up and going to knock the form down on them. I seen him smoking cigarettes on the scaffold every day.

"Q. Was his smoking cigarettes habitual or occasional?

"A. Well, occasionally I would see him smoking. I don't know what he was doing all the time, as many times as he went down, and he went down six or seven times and sometimes more. Pretty nearly every time he went down he had a cigarette. He was doing that on the scaffold. I had occasion to pass down the ladder where he was working on the scaffold. He acted like he was fooling away just the same as if you asked me a question, and I didn't pay any attention; he would be talking to somebody else and the same at his work. I told the foreman about it. I told the fore-

man that he should give Jackson another man in the place of those two boys, and that if he didn't somebody is going to get hurt. The foreman didn't say anything to me. That was the first time I spoke to him. I spoke to him after that. The second time I told him the same thing, and he didn't answer me, and I spoke to him the third time. I told him that he had better get a man to help Jackson take down those forms and take those two boys away because they were no good to Jackson, and I said that somebody is going to get hurt here. He says, 'What shall I do with them?' I says, 'Fire them.' He said, 'What shall I do with them? I have not got any other work for them.' I says, 'Fire them.' That was all, and it ended there. The things that I saw the boy do before I made that statement to the foreman was, I seen that he didn't pay any attention to his work, and I seen that quite a few times because I was up and down the ladder pretty often. I saw this boy working on the scaffold, and I seen him working on the concrete. On the scaffold I seen him and he laughed and giggled, and when I came down the ladder he asked me if it was not time for the beer to come around. I noticed him doing those things quite a few times during the day, and while he was working on the concrete it was about the same thing. I didn't keep track of it, but I seen him quite a few times off and on. I knew about the chalk incident. He was giggling and fooling on the scaffold, and this other man was giving chalk to mark those forms to number them all so that these forms could be placed back together the same as they were taken down, and this long fellow numbered every piece when they were together, so that when they were taken down they could be placed together, and this short fellow took the chalk away from him by fooling, and started to mark the forms, and refused to work, and they were fooling with the forms and marking them around, and this long fellow went down off the scaffold, and it was right then when Jackson got hurt."

Cross-examination by Mr. McCaskill:

"I was doing carpenter work for Schillinger Bros. Company. I was not foreman, but the foreman sent me all over the work. I don't know the name of the

foreman. This is the foreman that I told that he had better give a man up there to help Jackson. I don't know his name. When I told him he was down on the basement floor. At the time that I told him he was at that time doing carpenter work. I don't remember just where. I was making forms there, and if there was any form that broke or the wheelbarrow cut through, I had to go and fix that, or if the elevator gave out, I was supposed to go and fix that. I didn't do any carpenter work down in the room where they were taking down the forms. We used to go down and get the forms and then go down and carry them up on the second floor. We were taking those forms that had been taken down, and was carrying them up to the second floor. The other carpenters helped me. The only one I knew was George, that is the only name I know. George Jackson and one fellow by the name of Antone, and I don't know any other name. Jackson didn't help me carry forms out of this room. It was a fellow by the name of Antone. Sometimes five of us carried out the forms. I noticed this boy before I carried out the forms. I noticed him the day before we ever started to carry the forms up, and I saw him once in a while smoking cigarettes and laughing. I didn't see anybody else smoking cigarettes at that time. I don't remember seeing anybody else smoking cigarettes there. * * * We were working there in the brewery and we got the beer there and drank it. I didn't think anything strange about that. I didn't consider him negligent or careless because he drank beer, but he didn't pay any attention to what he was doing. I considered him negligent and careless because he would roll up a cigarette and smoke it while at work. * * * There was not anything particular in the size of those boys that made me think it was dangerous to have them up there. If they had paid attention to their work they might have done it all right. I didn't tell him [the foreman] they were not paying attention to their work. I told him they were not fit to work up there with Jackson. I simply told him that he had better put a man up there with Jackson and take those boys away. That is all I told him. I didn't tell him what they were doing. I didn't think it was my business to explain to him about his

men. I don't know whether he knew what they were doing or not. If he had seen them working I suppose he could see himself what they were doing. I didn't tell him."

Upon the question of Weimer's competency, plaintiff himself gave testimony, upon cross-examination as follows:

"These two young fellows helped me on the scaffold to take down these forms for pretty nearly three days. They were all the time after Frank left. During the three days that I was working there with these two men one of these fellows was scared. He was the tall fellow. I don't know who he is. He was quite a tall, young lad. He was not the man that was with me at the time I got hurt; he was on the ground.

"Q. Now, the man that was with you on the scaffold at the time this accident occurred, had you seen anything out of the way with him prior to the time you got hurt?

"A. No, sir; I did not.

"Q. He was working just the same as anybody else, was he?

"A. I didn't pay any attention to him.

"Q. You were working right there with him?

"A. He was on one end of the form, and I was on the other end.

"Q. As far as you could see, he was doing his work just the same as anybody else would?

"A. Well, yes.

"Q. And you do not think he was careless or indifferent about his work, do you?

"A. No."

The foregoing constitutes all of the material testimony on the question at issue tendered on behalf of the plaintiff. The defendant through the witness Weimer denied the fact that plaintiff's injury occurred in the manner testified to by him, and said that plaintiff simply stepped to one side, lost his balance, and fell. The court upon this point charged the jury as follows:

"The plaintiff claims he was injured by the negligence of Weimer; he concedes that Weimer was a fellow-servant, and that he cannot recover from the defendant unless it appears that Weimer was an habitually careless person, and that his carelessness was of such a character as made it imprudent to keep him in the service, and that the defendant either knew, or in the exercise of due care should have known, that Weimer was that sort of a servant. Now, gentlemen, we are, as I have already said, at the main question in this case. If you pass these other questions in favor of the plaintiff, then, in order to find the defendant liable, you must be satisfied by a preponderance of the evidence that Weimer was an habitually careless servant, and that the defendant, or the foreman of the defendant, because he represented the defendant at the time and place in this connection, that the foreman either knew, or in the exercise of care and prudence should have known, of the careless character of the servant. In considering these questions, you will understand this to be the law: That you cannot find the defendant guilty of negligence in retaining the servant Weimer in its employ in this work unless you find by a preponderance of the evidence that he was habitually careless in the performance of the work itself. To make myself clear, gentlemen, if you find that Weimer smoked cigarettes and took a glass of beer and hollered at men when they were going up and down, always boyish and buoyant as boys are at times, when he was not engaged in the work itself, then he was not a careless servant; but you must find that while he was engaged in taking down the forms, while he was doing his work, that he was habitually careless, and that the defendant knew that, or if the defendant or its foreman had exercised reasonable care and diligence to ascertain this fact, he would have known it. Again, in order to charge the defendant with negligence in retaining Weimer in its employ in this work, it is not enough to show, and it will not be enough for the jury to find, that he was guilty of a single act or an exceptional act of carelessness or negligence. It must appear that the carelessness of the servant was habitual rather than occasional."

A verdict having been rendered in favor of plaintiff and judgment entered thereon, the defendant brings the case to this court for review.

BROOKE, J. (*after stating the facts*). The work to be performed by plaintiff and his helpers, including Weimer, was simple in character. It involved no particular hazard and required no particular skill. It was plaintiff's duty to saw the forms himself, after which he and his helpers loosened and lowered them. Any one of reasonable intelligence and sufficient strength would be competent to perform such labor. And it is not contended that Weimer was lacking in either particular. Under such circumstances and for the performance of such labor the employer is not required by law to either give instructions in regard to the work or inquire into the experience of the laborer. *Timm v. Railroad Co.*, 98 Mich. 226 (57 N. W. 116). In *Kellogg v. Lumber Co.*, 125 Mich. 222 (84 N. W. 136), it is said (quoting from *Baltimore Elevator Co. v. Neal*, 65 Md. 438 [5 Atl. 338]):

"Negligence, such as unfits a person for service, or such as renders it negligent in a master to retain him in his employ, must be habitual, rather than occasional, or of such a character as renders it imprudent to retain him in service. A single exceptional act of negligence will not prove a servant to be incapable or negligent."

The only evidence of Weimer's incompetency is furnished by the witness Muchinsky. When analyzed it amounts simply to this: That on various occasions witness saw Weimer smoking cigarettes on the scaffold within 10 or 12 feet of plaintiff, that he saw him laughing and giggling, and that he joked him about a bottle of beer, all of which took place in the presence of plaintiff. He further testifies that Weimer seemed to him to be careless and unattentive. This testimony

in our opinion falls far short of proving incompetency on the part of Weimer to perform the labor in hand. Many good workmen laugh and joke. Undoubtedly some good workmen even smoke cigarettes, but we have never before heard either act urged as a ground for claiming that a man who indulges in them is incompetent to perform hard labor. Moreover, the record fails to disclose that the defendant had any knowledge of even these acts on the part of Weimer. It is true Muchinsky testifies that he told the foreman he should take the boys from the platform and give Jackson a man to help him, otherwise there would be an accident, but he carefully refrained from assigning any reason for his request. If the foreman received the communication from Muchinsky exactly as testified to by Muchinsky (and he denies having received it), he would have been perfectly justified in disregarding it, in the absence of any statement of specific instances of misconduct or incompetency calling for the warning. *Snodgrass v. Steel Co.*, 173 Pa. 228 (33 Atl. 1104).

But the remarkable and controlling consideration is that the plaintiff himself worked within 10 feet of Weimer for upwards of 2½ days, and he must have seen every act and heard every word uttered by Weimer during that time. The conduct of Weimer evidently did not impress plaintiff as either careless or as evidence of incompetency. On the contrary, assuming Muchinsky's statements to be true, that conduct did not afford any evidence to plaintiff that Weimer was either careless or incompetent. Where employer and employee have equal knowledge of the incompetency of a fellow-servant of the employee who is retained in service, each party takes the risk, unless the employer undertakes to give special directions. *Davis v. Railroad Co.*, 20 Mich. 105 (4 Am. Rep. 364).

We must hold that there was no evidence introduced by the plaintiff warranting the submission of the question of defendant's negligence to the jury.

The judgment is reversed, and a new trial ordered.

MCALVAY, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

SCOTT v. BOYNE CITY, GAYLORD & ALPENA RAILROAD CO.

1. MASTER AND SERVANT—PERSONAL INJURIES—CAUSE OF ACCIDENT—EVIDENCE.

Upon the second trial of a negligence case, in which it was claimed that the manner of decedent's death was matter of conjecture, and that the jury should not have been permitted to guess or speculate as to the contention that decedent caught his foot in defective blocking in defendant's tracks, evidence not offered on the first trial and tending to prove that there was only one place in which decedent could have caught his foot near the point of the road where the accident took place, presented a question of fact for the jury. *Scott v. Railroad Co.*, 169 Mich. 265 (135 N. W. 110), distinguished.

2. SAME—QUESTION OF FACT—TRIAL.

When the circumstances disclosed by the evidence justify inferences that are sufficient to remove the cause of accident from the field of conjecture to that of probability, it should be left to the jury to draw the proper inference.

3. SAME—CONTRIBUTORY NEGLIGENCE.

And testimony that the deceased would have got on the train in safety if his foot had not caught in the blocking, and where there was no proof tending to show that his attention had been or ought to have been directed to the

faulty condition of the blocking, he was entitled to assume that the defendant had performed its duty and had conformed to the requirements of law, and it could not be held, as matter of law, that decedent was chargeable with negligence.

4. EVIDENCE—MORTALITY TABLES—COMPUTATION.

Plaintiff's attorney was correctly permitted to testify to his computations showing the probable earnings of deceased during his expectancy, reduced to the present worth, where the court fully and properly charged the jury relative to the value of this testimony and their duty.

Error to Otsego; Sharpe, J. Submitted June 3, 1914. (Docket No. 12.) Decided October 2, 1914.

Case by Samuel Scott, as administrator of the estate of Frank Gibbs, deceased, against the Boyne City, Gaylord & Alpena Railroad Company for the unlawful killing of decedent. Judgment for plaintiff. Defendant brings error. Affirmed.

Harris & Ruegsegger, for appellant.

De Foe, Hall & Converse, for appellee.

KUHN, J. A complete statement of the facts in this case is found in the two opinions of this court when the case was here before, reported in 169 Mich. 265 (135 N. W. 110). Being sent back for a new trial, a verdict and judgment thereon was again had for plaintiff, and the case is again brought here by writ of error. The assignments of error have been grouped, and it is urged that the case should be again reversed because:

(1) The exact cause of the accident was not proved, and the jury were allowed to guess and speculate as to it; (2) contributory negligence on the part of the plaintiff's decedent; (3) errors committed before the jury; and (4) refusal to grant a new trial.

It was the opinion of the majority of this court when

the case was here before that as to how and where the injury occurred upon the record as made was a matter of pure conjecture. It is the claim of plaintiff's counsel that upon the retrial of the cause material changes in the facts were shown. The claimed material changes are set forth in their brief as follows:

"In this present record the exact place is shown where Gibbs was standing at the time of his injury to be at the north of the rails and about halfway between the switch and the block—if anything, closer to the block. This is shown by Exhibit 1, the testimony of Betterly, and also the testimony of defendant's witness Frances Biskie. It also shows that the distance between the throw rail of the split switch and the main rail at the point of the switch when open is $3\frac{1}{2}$ inches, instead of $5\frac{1}{2}$ inches, as therein stated, and it narrows to $2\frac{1}{2}$ inches in 3 feet from the end. The speed of the train at the time of the injury is shown to be 3 or 4 miles an hour, instead of 5 miles miles, as stated in the opinion. We also call the court's attention to the fact that the eyelets of the shoe (Exhibit 4) show the strain on them. This is to be considered with reference to the other facts as to the condition of the shoe, as it was found directly after the accident. It is also shown conclusively that there were no places between the switch and the block where one's foot could get caught and held, as it is shown that Gibbs was, instead of there being 21 places, as indicated in the former opinion."

The plaintiff rested his case before, and does now, upon the claim that the decedent caught his foot at the defective blocking. A reading of the opinion of Mr. Justice MCALVAY shows that it was the opinion of the majority of the court that, as it appeared from the evidence, at about the place at which it was claimed plaintiff's decedent stood there were 12 places, exclusive of the defective blocking, into which his foot could have been caught if he caught his foot at all, it was just as probable that Gibbs' foot was caught in this

"gridiron of holes" as in the defective blocking, and that therefore the case should not have been submitted to a jury, as the verdict must necessarily rest upon conjecture or guess.

Upon the new trial testimony was introduced to show that it was impossible for Gibbs to have caught his foot in these places referred to in the former opinion. Mr. Van Auken, plaintiff's witness, testified in part as follows:

"I heard of Mr. Gibbs' death when I was at Vanderbilt. It was the 12th day of June, 1909. I drove there the same evening. I was at the place where he met his death first the next morning. That was Sunday. I made an examination of the surroundings. It was just east of the switch by the cooperage. I knew the street called Mill street here. It was west of Mill street—the first switch west of Mill street. Homer Scott was with me. I went down again in the afternoon. Mike Poquette was with me then, I think, and Mr. Betterly come over there. There were several around there. Homer Scott was back again at this time, I think. In the morning I was there half an hour to an hour, perhaps; in the afternoon about the same. I was there later. I think it was about a week's time after that when I went after the goods. Mr. Betterly and Mr. Scott, I believe, and another gentleman were with me. At subsequent times I was there; I could not tell how many times. The third time was about a week after. I was there on Sunday; I remember that; and I was there Monday morning, and afterwards before we came away. Sunday morning I was there first; then Sunday afternoon and Monday morning; then when I went over after the goods I was there again; and I was there about the middle of July, the same year—July 13th. Mr. Betterly was with me, and Mr. Devere Hall was with me there. I know Mr. Durfee. He was formerly sheriff of the county. I think he was there at the time I went over after the goods. From the first time I saw this switch and the ground around it, and the rails and those other things connected with the location, there was no change in it at all down to July 13th, that I could dis-

cover. I looked with that in mind. It was the same as on the Sunday following the death. On the 13th of July I took measurements that I made records of. Mr. Betterly was with me at my request. * * *

"Q. Now, Mr. Van Auken, did you make any experiment to determine the places where the foot of one would be caught about the switch?

"A. Yes, sir.

"Q. How many different times did you do that?

"A. I could not tell you, so many of them.

"Q. Well, did you do it the first time you was there?

"A. I did.

"Q. And each time you was there?

"A. Yes, sir; I don't remember of ever being there but what I tried it, until the last time I was there—next to the last time I was there—then things were all changed.

"Q. What was the result of your experiments between the ties north of the rails from the switch east?

"A. There is no chance for a foot to be caught.

"Q. Well, did it catch?

"A. No, sir.

"Q. What was the result of your experiments inside of those two rails from the switch east?

"A. My foot would not catch there, did not.

"Q. Well, did it on any of those occasions?

"A. It did not.

"Q. Did you make any experiments with reference to the place where the point of the rail—the split rail—and the main track rail came together near the switch?

"A. I did.

"Q. Well, what did you do there?

"A. Foot wouldn't catch there.

"Q. That was where the space was $3\frac{1}{4}$ inches?

"A. That was at the point of the switch rail up to where it was so narrow that the foot would not go in.

"Q. Now, when you put the foot in there, what would be the result?

"A. Draw out.

"Q. What was the surface of the side of a split rail next to the main line rail?

"A. It was straight up and down as might be.

"Q. Was there any projections or bolts with heads on of any kind that interfered with your foot?

"A. No, sir.

"Q. Any overextension of the rail that interfered with your foot in any way?

"A. No, sir.

"Q. Did your foot catch in that place and hold it?

"A. No, sir.

"Q. At what other points did you make experiments?

"A. At the block.

"Q. Which part of the block?

"A. I would not be just positive as to that, but it seems now it was nearly one-half—about midway of the block; that is the way it seems now.

"Q. Well, you did at the block anyway?

"A. At the block several times. * * *

"Q. Now, you say you tried to get your foot in the rails west of the blocking, did you?

"Mr. Hall: West of the blocking?

"A. Yes, sir; do you mean at the point of the switch?

"Q. I mean between the throw rails and the main rail west of the blocking?

"A. Yes, sir.

"Q. And you found no place there where you could get your foot in between the rails?

"A. I found no place where it would catch.

"Q. Well, now, when you mean 'catch' you mean by stepping on the rails that your foot did not catch there?

"A. It did not catch.

"Q. How did you step on those rails, lengthwise or crosswise?

"A. Lengthwise.

"Q. How many times did you do that?

"A. I could not tell you.

"Q. Jump on them quickly?

"A. Just as I would the other way.

"Q. At whose suggestion did you do that?

"A. At my own."

On being recalled he said:

"Q. In your experimenting, did I understand you

to say that you stepped your foot on the rails between the two rails, outside rail and the throw rail?

"A. Yes, sir.

"Q. At what point along that rail?

"A. At the point.

"Q. And your heel would not go in at the point?

"A. Yes, sir.

"Q. How is that?

"A. Yes, sir.

"Q. Oh, it would?

"A. Yes, sir; my foot would go down.

"Q. Well, what other places did you try?

"A. Every place where there was a conceivable place to get one's foot caught there.

"Q. Now, then, you probably tried it the whole length of that throw rail, did you?

"A. No; I can't say that I did try it the full length of that throw rail, for part of the way there was no chance to get a foot fast at all?

"Q. Well, could you not get your foot in between the rails?

"A. No, sir.

"Q. The side of your foot, or heel, or anything, if they were 2 or 3 inches apart, you could, couldn't you; you could get your foot in, couldn't you, if they are 2 or 3 inches apart?

"A. No; not at the 2 inches apart and $2\frac{1}{2}$.

"Q. Well, you could up next to the block pretty near to the end of the block; you could get your foot in there, couldn't you?

"A. I did.

"Q. Yes; you say the difference in distance between the west end of the block and the middle of this throw rail was hardly perceptible—the distance between the two rails?

"A. How is that?

"Q. I understand you to say that the difference in the distance between those two rails—the throw rail and the main rail—and the west end of the block, at the middle where this $2\frac{1}{2}$ inches commences, was hardly perceptible?

"A. No, sir; you didn't understand me to say any such thing; I didn't say any such thing. * * *

"Q. Mr. Van Auken, how long a space was there at the point of the switch between the rails where the foot would get in?

"A. Why, I should think about 3 feet, possibly.

"Q. And during that entire distance was there anything, any ball of the rail, the split rail, which held the foot?

"A. No, sir.

"Q. And what was the side of the split rail that entire distance?

"A. Perpendicular.

"Q. And was there any place that rivet heads or anything that interfered with the foot coming right out?

"A. No, sir.

"Q. Now, you were asked by counsel whether you measured the distance between the two rails at the west end of the blocking?

"A. Yes.

"Q. Just read what your second entry is on the book that you made.

"A. 'Width between rail west end of block $3\frac{3}{4}$ inches.'

"Q. Well, you did measure it, didn't you?

"A. Yes, sir; I did."

Homer Scott testified:

"I saw Mr. Van Auken make experiments with reference to the condition of the north rails and the track at the switch east of the switch with reference to the foot catching. He tried his foot on each side of the track, and he also tried it at the end of the block at the west end of the block, and it would catch at the west end of the block. It did not catch any other place. I saw him try it two or three times."

George Durfee testified:

"We were talking about it and the probabilities of his getting fast anywhere, and the only place that we could find that he could get a foot fast was over this blocking on the switch.

"Q. Well, did you try to find other places?

"A. We did; yes.

"Q. And what was the result when the foot was placed upon the west end of the blocking on the rails, at the west end of the blocking?

"A. Well, if you step in there and your foot slid ahead a little, you could not get it out."

No testimony was offered by the defendant to show that one's foot could have been caught and held at the places claimed. From the testimony of Betterly, the eyewitness, the jury could reasonably say that Gibbs was caught by the blocking and held until drawn under the train. He says he saw Gibbs take hold of the brake hanger beam, and then saw his body straighten out as if he was fast, and illustrated the situation to the jury.

It is our opinion from the record as now made, considering the evidence of Betterly as to the position of Gibbs, of Van Auken, and the others, as to the measurements and condition of the track, the evidence of the defective condition of the blocking, the marks on the foot, the condition of the shoe and its location after the injury, the place where the parts of the body lay, a reasonable and legitimate inference might be drawn that the injury was caused by the defective blocking, and when there are such circumstances shown as to justify inferences which bring liability within the realm of probability, the question of inference should be left to the jury. *Morton v. Railroad Co.*, 81 Mich. 423 (46 N. W. 111); *Knapp v. Railway Co.*, 114 Mich. 199 (72 N. W. 200); *Jones v. Railroad Co.*, 127 Mich. 198 (86 N. W. 838); *Little v. Bousfield & Co.*, 154 Mich. 369 (117 N. W. 903); *Parker v. Union Station Ass'n*, 155 Mich. 72 (118 N. W. 733).

It cannot be said that Gibbs, in entering between the cars at the place he did, was guilty of contributory negligence as a matter of law. It is a fair inference from the testimony that he would have gotten onto the train safely had not his foot caught in the

defective block. There was no evidence to show that his attention had been directed to the condition of the block, or that its condition was such as to necessarily draw his attention during the time he waited for the return of the train. Moreover, he had a right to assume that the defendant had complied with the requirements of the statute and had performed its duty. There was testimony to show that the place selected by Gibbs to mount the train was the usual place, and that the manner and method pursued by him were usual and habitual. The question of contributory negligence was a question of fact, and properly submitted to the jury.

Error is assigned because the court allowed the plaintiff's attorney to testify as to certain computations to show the earnings of Mr. Gibbs during his expectancy of life, which Mrs. Gibbs claims she was deprived of, computed at their present worth. This was not error, as the trial court properly instructed the jury with reference thereto, as to the value of this testimony and their duty. *Sonsmith v. Railroad Co.*, 173 Mich. 57 (138 N. W. 347).

We are of the opinion that this case was submitted to the jury with proper instructions, and that there is sufficient evidence in the record to sustain their verdict.

Finding no prejudicial error in the record, the judgment is affirmed.

MCALVAY, C. J., and BROOKE, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

HUGGETT v. ERB.

1. RAILROADS—NEGLIGENCE—TRESPASSERS—PERSONAL INJURIES.

Where the evidence, in an action for personal injuries to an infant under three years of age, tended to show that if either engineer or fireman had maintained a lookout along the track they must have seen plaintiff and another child on the track and discovered their size and helpless position in ample time to have stopped the train, and where the engine was running through a populous section of a city, across numerous street intersections and along a portion of the track which the public had used extensively as a way and traversed continually, and there was evidence of an eyewitness that those in charge of the engine were not looking ahead along the track, the trial court erred in directing a verdict for the defendant, on the ground that no actionable negligence was established.

2. SAME—INFANTS.

While children *non sui juris* who invade private property are technically trespassers, they are not wilful trespassers, knowingly doing a wrong or incurring risk, in a sense which would legally charge them with negligence or personal responsibility as in the case of older persons who are not under disability.

3. SAME—STATION AND GROUNDS..

Although the infant was injured on defendant's station grounds, and defendant had posted warning signs forbidding trespassing, where the public, nevertheless, made frequent use of the right of way to pass between the street and defendant's station, and the child was too young to comprehend the warning or the danger, the employees of the defendant railroad corporation were required to exercise care and prudence to prevent an injury to the child on a clear stretch of track away from the confusion of yard work and freight cars, at a point where the public were accustomed to frequent the tracks as a way of travel.¹

¹ The question of the care required of railroad companies to prevent injuring small children upon the track is treated in a note in 25 L. R. A. 784.

As to the duty to keep lookout for infant trespassers on railroad tracks, see note in 8 L. R. A. (N. S.) 1079.

4. SAME.

Accordingly, the questions as to the extent to which defendant's track was traveled at the place of the accident, defendant's knowledge of the use, and the degree of care required in operating trains in that locality, should have been left to the jury.

Error to Gratiot; Searl, J. Submitted May 1, 1914.
(Docket No. 113.) Decided October 2, 1914.

Case by Eva Huggett, by next friend, against Newman Erb and others, receivers of the Pere Marquette Railroad Company, for personal injuries. Judgment for defendants on a directed verdict. Plaintiff brings error. Reversed.

Kress & Dunham and Chapman, McNamara & Matthews, for appellant.

Bills, Parker & Shields (John T. Matthews, of counsel), for appellees.

STEERE, J. Plaintiff, a child two years and eight months old, was run over and seriously injured by one of the Pere Marquette Railroad Company's west-bound trains as it was leaving the city of Alma at 1:40 in the afternoon of May 17, 1912. This action is brought by her father, as next friend, against the receivers of said railroad, to recover for the injuries she sustained.

The declaration originally filed alleged as actionable negligence a failure of duty to give proper warning of the approach of the train, to keep it under control, to appreciate the danger, to keep a sharp lookout ahead, to use every possible means to stop the train before striking the child after she appeared upon the track, etc., whereby, and by reason of the train being run in "a wilful, wanton, reckless, malicious, cruel, inhuman, and grossly negligent manner, (it) struck

plaintiff, who was then there upon said tracks of defendant without any fault or negligence on her part." During the progress of the trial, the declaration was amended, against objection and by leave of the court, by adding an allegation that, for more than 10 years prior to the time of said accident, that portion of the track where it occurred was customarily and freely used by the public as a thoroughfare; that it was the custom of residents of Alma, and other persons going to and from the passenger station of defendant and other places to which the track afforded most convenient travel, to pass on foot along defendant's main track at that point, of which fact defendant, its agents and employees, had full knowledge, by reason whereof it was its and their duty to anticipate the presence of persons upon that part of the track, and to particularly keep a vigilant watch, exercise special care, give due warning, etc., with reference to such custom and consequent increased danger, which duty defendant utterly neglected.

At the conclusion of plaintiff's testimony the court directed a verdict for defendant on the ground that the child was a trespasser upon the track to whom defendant owed no duty, except not to run over her, if possible to avoid it after discovering her presence; that trainmen owed no special duty to keep watch for trespassing children on the track more than for adults; and, it being conceded that the trainmen did not discover plaintiff upon the track or have any knowledge of her presence there until after the accident, no actionable negligence was shown.

The accident occurred about 750 feet west of the station and water tank at which the train had stopped, in a resident portion of the city where the track crosses the north part of a block lying between two north and south avenues named Park and Lincoln; Park bound-

ing the east side of the block, nearest to the station, and Lincoln the west. These two north and south avenues are crossed by Center street, which, running east and west, bounds the block on the north. Going west from the station, the track bears somewhat northerly at an angle with the lines of lots and streets of the city until it enters the north half of said block between Park and Lincoln avenues, where it swings by an increasing curve more to the north and leaves the block near its northwest corner passing to Center street, thence crossing said street and Lincoln avenue diagonally at their intersection and entering the block lying directly to the northwest. The tracks of the Ann Arbor Railroad Company are upon the same right of way and parallel defendant's tracks on the north, with a space of 9 or 10 feet between the two from the station to where plaintiff was struck, and beyond. The track in that locality is nearly level, with a slightly rising grade west of the station, from which there is a plain and unobstructed view along the track past where plaintiff was injured, to a station post located $87\frac{1}{2}$ feet easterly from Center street towards the depot.

On the right of way east of Center street, and near where plaintiff was injured, stood a sign erected by defendant many years previously, upon which was painted in large letters "Railroad grounds—trespassing strictly forbidden;" but it was conclusively shown that it was and had been for many years an uninterrupted custom of the public to freely and frequently travel back and forth along the track from Center street and beyond, to and from defendant's station and other points. Witnesses who had been in the habit of so using the track, and persons living in the vicinity, testified that it was customarily and habitually traveled, by those having occasion, as freely as a public thoroughfare; that persons could be seen traveling

the track there almost every hour in the day; that, any time one happened to look, some person or persons could be seen on the track going one way or the other; that it was used as a highway generally by the majority of persons making all trains; that both adults and children used the track each day as a way of travel, and it would be safe to say 30 or 35 people use it daily. George Cowles, who had been in the employ of defendant as brakeman and conductor several years, and was intimately acquainted with the road at that point, testified that the people of Alma used the track "as much as a public thoroughfare," and they always had, since he was familiar with it; that both adults and children were walking the track daily; that he noticed this when he was running trains as conductor and working on them as brakeman.

When injured, plaintiff was on defendant's main track between the two avenues mentioned, near the middle of the block, east and west, where the track curves northerly and about 160 feet southeasterly along the track from Center street. The day was clear, and when on the track she was in plain view from the water tank and station, and from any point along the track between. The train had taken water at the tank opposite the west end of the passenger station, and, starting from there, had reached the speed of eight to ten miles an hour where the accident occurred.

Plaintiff's family lived on Maple avenue, two blocks west of Lincoln avenue and half a block south of Center street. Before the accident she was last seen at home not long after the family had finished their noon-day meal, to which they sat down about 12:30 p. m. She was then playing in the yard with a neighbor's little boy, nearly a year older than she. Shortly thereafter her mother found that the children had disappeared, and the mother of the boy discovered their

absence at about the same time. The two mothers were searching for their children when the little girl was injured.

The most graphic description of the accident is given by Mrs. Lois Powell, who lived on the south side of Center street, west of the track, and was hanging out clothes in the yard south of her house at the time. Her attention was called to the approaching train as it left the station, and when it was just west of Park avenue she noticed the two little children alone on the track. She immediately hurried towards them, calling to them to "get off the track," and waving a cloth at the fireman, who was on the side next to her and looking south out of the side cab window, but apparently did not notice her or them. The train did not slacken, and before she reached the children it ran over the little girl, cutting and bruising her badly, crushing an arm so that it was found necessary to amputate it as soon as medical attendance was procured. The little boy moved off the track in time and was not injured. Mrs. Powell testified that when she noticed the children upon the track the locomotive was within from 25 to 50 feet of them; about 50 feet being her last judgment.

In support of the directed verdict for defendant, counsel urge that plaintiff was a trespasser upon the track, and defendant owed her no duty except not to injure her after she was discovered; that there is not only a total absence of proof that any of the trainmen did discover her at all but it is shown they did not, and evidence is wanting to prove that it would have been possible to stop the train and avert the accident after the time she is shown to have been on the track. Defendant's counsel say in their brief:

"They fail to show that the child was upon the track a sufficient length of time or distance ahead of

the train, so that it would have been possible to have stopped the train in time to avert the accident. As we have pointed out in our statement of fact, 45 feet is the greatest distance shown by the testimony, or 50 feet at the outside, that the train was east of the child when she appeared to Mrs. Powell upon the track."

Counsel also inadvertently say:

"This is the only evidence in the record showing that the children were in a perilous position at any time before the engine struck the plaintiff."

Mrs. Powell is not the only witness upon that subject. Her daughter Hulda had just previously stepped to the door for a moment to scrape some victuals off from a dish, when she noticed the train at the station and the two children on the Park avenue crossing. Two or three minutes later she heard her mother scream, and, going to the door, saw the train passing Center street after running over the little girl. A Mrs. Brown, who lived at the corner of Park avenue and Center street, saw the two children, just before the accident, on the track about 100 feet west of Park avenue crossing, playing along the track and moving west. She testifies:

"When I saw them on the track I knew the train was back here at the station. * * * There was no one in my house with me but my little baby two years old. When I saw the children on the track I went over to Mrs. Whiting's to leave my child there so I could go and get the children off the track. But I did not leave my child there, because she was not at home. The children on the Pere Marquette track were playing, gradually going down the track west. When I found Mrs. Whiting was not at home, I went back home. I was excited. I did not know what I might do, but I went in the house. I heard the train. The train went through, and I knew I could do nothing."

Plaintiff's brother Orla, under 13 years of age, and

a companion named Jay Glover, 10 years old, saw the children on the track when the approaching train was east of Park avenue. Orla had been directed by his mother to look for his sister at the time her absence from home was discovered, and Jay accompanied him. The two boys had gone east on Center street, drawing a little wagon with them, to the corner of Center street and Park avenue, when they saw the train coming, and about the same time, on looking across the block to the railroad, between two houses, they discovered the two children going westward on the track in the path of the approaching train, which Orla testified was then east of Park avenue. He ran towards his sister, Jay following him, but was not in time to rescue her. Jay testified that when they saw the children the train "was right back of us coming from the depot. It was back of Park avenue towards the depot."

The block in which the accident occurred is 332 feet wide, east and west. She was struck just west of the middle of the block. Park avenue is 66 feet wide. The water tank from which the train started was 752 feet distant. There is abundant evidence tending to show that this small child, barely more than an infant, was upon the track and in plain sight of those upon the approaching engine much further away than the distance required to stop the train. At its maximum speed in approaching her, 8 or 10 miles an hour, it could have been stopped in from 50 to 150 feet.

Cowles, the former brakeman and conductor, who was acquainted with the particular engine used that day, and had often ridden in the engine when head brakeman, testified that from the water tank going west, on either the engineer's or fireman's side, there was an unobstructed and plain view as far as the station post and pretty close to Center street; that he was familiar with the engine, number of cars, weight,

manner of control of the train, etc., and, when going from 8 to 10 miles an hour, it could have been stopped on that track and grade in from 50 to 75 feet. The fireman of the engine stated it could be stopped in from 100 to 150 feet.

Assuming the testimony in behalf of plaintiff to be true, as we must in passing upon a directed verdict for defendant, it tends to show that had either the engineer or fireman on that train looked ahead along the track at any time while they were covering the distance from the station to the place of accident, until so close that the front of the engine obscured their view, they must have seen these little children upon the track unattended, and discovered their size and helpless condition in ample time to have checked or stopped the train and avoided the accident. So far as there is testimony on the subject, neither kept watch ahead of this train, which they were running through a populous portion of Alma, where there were frequent crossings, and where it was so customary for the public to travel along that portion of the track that persons could be seen upon it almost any hour of the day. The fireman testified that he was not watching after the train started; that as it started he pulled the bell and looked ahead to see that the track was clear, and then busied himself putting in a fire, after which he got upon his seat on the left side of the cab, and just as he did so he saw a little boy on the side of the track right close to the engine, but did not learn they had run over a child until they reached the station beyond. The engineer was not a witness, and the only direct evidence as to his vigilance is by Jay Glover, who testified that, while running towards the children on the track, he looked up at the cab of the engine as it was close upon them and saw the engineer with his back towards witness, looking out across the river on the left side of the tracks.

It is contended in behalf of plaintiff that she was not a trespasser upon the track, both because the public generally, including children, had constantly used this track as a thoroughfare for many years, to the knowledge and with the acquiescence of defendant, and this child was of such tender age as to be incapable of becoming a trespasser.

It is said in 33 Cyc. p. 756: "A child, although *non sui juris*, may become a trespasser" on a railroad track, citing, amongst other cases, *Trudell v. Railway Co.*, 126 Mich. 73 (85 N. W. 250, 53 L. R. A. 271). In that case the court held that a boy seven years of age, playing upon the track, was a trespasser as a matter of law, and that the engineer was justified in believing he would step off the track in time, saying:

"There is no reason in this case for saying that he did not apprehend the danger, nor that he was of immature years, and must therefore be excused from exercising any care."

Thus evidently deeming it important to point out that he was not *non sui juris*; i. e., an infant "not of sufficient age and discretion to care for his own safety and render it prudent for him to go alone."

While it has been squarely held in some jurisdictions that such children, however young, are nevertheless trespassers, and in others that they are not, the tendency of our decisions is to recognize a distinction in their favor in certain particulars. *Marquette, etc., R. Co. v. Marcott*, 41 Mich. 433 (2 N. W. 795); *Id.*, 47 Mich. 1 (10 N. W. 53); *Keyser v. Railway Co.*, 56 Mich. 559 (23 N. W. 311, 56 Am. Rep. 405); *Battisill v. Humphreys*, 64 Mich. 494 (31 N. W. 894). In the latter case the court said of an infant three years old:

"A child of such a tender age as to be incapable of negligence cannot well become a trespasser."

In *Keyser v. Railway Co.*, *supra*, it is said:

"I do not think that an infant boy, only two years and six months old, walking or lying down upon the track of a railroad, becomes a trespasser to the extent of subjecting himself, without the right of redress, to the reckless or negligent acts or omission of the defendant. * * * Under all the circumstances stated in the record, I do not think that such a lookout as was called for by the appearance of the child upon the track was observed by the trainmen, nor that the plaintiff is 'compelled to submit' to consequences so serious as those appearing in this case, because he strayed upon defendant's track, when the injury could have apparently been avoided by proper care and caution exercised by defendant's engineer."

Conceding that children *non sui juris*, invading private property, are technical but unconscious trespassers, as would be a wandering animal, the view is sustained by these cases and abundance of other authority that they are not wilful trespassers, knowingly doing a wrong or incurring a risk in a sense which could legally charge them with negligence or personal responsibility, as in the case of older persons not under such disability.

It is urged in behalf of defendant that this accident occurred on its station grounds, which it was not obliged to fence, and where it posted a notice forbidding trespassing, and that:

"Where a railroad company has posted warning notices along its yard limits, notifying all persons to keep off the tracks, it is not liable to a child for injuries which it receives by going on a track filled with cars liable to be moved at any time, on mere proof that children are in the habit of playing on or near the tracks." *Katzinski v. Railway Co.*, 141 Mich. 75 (104 N. W. 409).

This quotation is from the syllabus of the case, the facts of which are meagerly stated. The child was 6½ years old, and was playing at or near a place

where there were four tracks filled with cars liable to be moved at any time. She was injured while a crew was coupling cars, without any notice or knowledge that she was on the track. In disposing of the case, the court said the fact, if shown, that children were in the habit of playing on or near the tracks would not tend to fasten any liability on the defendant, under the circumstances of that case. A somewhat similar case held, with little discussion, to be ruled by the last mentioned, is *Seeley v. Railway Co.*, 157 Mich. 688 (122 N. W. 214), in which a boy eight years old, playing with companions beside a track where a crew was switching, ran for a ride and climbed upon the brake beam of a flat car, grasping the hand holds on the end. In attempting to jump off, he fell under the wheels and was killed. We see nothing in those cases controlling here. They were decided under the special facts shown, and the circumstances disclosed are very different from those under consideration now. In both of those cases the children were of sufficient age, so that the question of their contributory negligence was open. They were supposed to possess sufficient discretion to take care of themselves, and the trainmen were not required to neglect their ordinary duties to watch them, or bound to give special warning before discovering them in actual situations of danger. The distinguishing and distinctive features here are that, while yet nominally in the station grounds, the accident occurred on a clear stretch of track, away from any confusion of yard work or accumulations of cars, after the crew had settled down to its run, 750 feet from the station house, had crossed two streets, and was departing through a populous portion of the city, not crossing its streets at right angles and at a point where the public generally was accustomed to extensively use the tracks as a way of travel, and the injured child was of such tender years as to be incapable

of appreciating the presence of danger or, apparently, even understanding what was meant when called to "get off the track."

If the accident had occurred at a crossing, or there was testimony tending to show that the child was seen from the engine in probable time to stop or check the train so as to avoid injuring her, it must be conceded that the case should have been submitted to the jury. Plaintiff's testimony tends to show that, had the engineer or fireman looked out ahead of the train, they must have seen her. It was their general duty to run the train with reasonable care and watchfulness. It is neither just, nor sound in principle, to say that, by avoiding seeing her through neglect of duty, they can protect defendant from liability under the broad general rule that it owes no duty to trespassing children until they are discovered in a place of danger, a rule upon which the authorities are not in harmony, and which Judge Thompson in his work on Negligence, § 1809, designates as "cruel and draconic."

There is a marked difference between the announcement of a general rule and its application to the facts of a particular case, for often, with a change of circumstances, a general rule must undergo modification. Even conceding that, up to the point of discovery, the duty to all trespassers, whether young or old, is the same, back of that lies the question of duty to have seen, which may in law carry with it the responsibility, or civil law *imputatio*, of having seen.

As a general measure of safety for all, it is the duty of those operating trains to be watchful and guard against possible accidents of all kinds, without special reference to any particular persons or things, to observe environments, watch where they are going, and maintain such a lookout at all times as is reasonably required by the circumstances, "and which should be more careful where there is risk of access to the track

than where it is less likely." *Marcott v. Railway Co.*, 47 Mich. 1 (10 N. W. 53).

This accident occurred in a city, between two closely adjacent streets, at a point where citizens of all classes were accustomed and suffered to use the track as a thoroughfare, and where defendant's trainmen had reason to know and expect persons might be walking along the track at any time. In 23 Am. & Eng. Enc. Law (2d Ed.), p. 754, these general rules, as applied to such conditions, are deduced from many authorities there cited, including *Marcott v. Railway Co.* and *Bat-tishill v. Humphreys*, *supra*, from our own court:

"Where there is reason to apprehend that the track may not be clear, as in the case of tracks running through cities or other populous districts where persons are in the habit of crossing or walking on the tracks, the persons operating the train cannot act on the presumption that the track is clear, and so fail to maintain a proper lookout, without making the company responsible for the consequences. Especially is this true, according to some authorities, where the trespassers are children, or where there is such a custom established on the part of the public of going upon the tracks, as to amount to a license. In such cases a failure to see is not alone sufficient to give rise to liability, but there must be a failure to see after the exercise of ordinary care."

Vide, also, 2 Thompson on Negligence, and vol. 8 (White's Supp.), § 1726, and cases cited. In volume 8, § 1725, relative to the duty of care as to persons using a railway track as a footpath, amongst other things it is said:

"And for the purpose of this rule it makes no difference that the railroad company has posted sign-boards warning people not to trespass on the right of way."

In *Montgomery v. Railway Co.*, 103 Mich. 46 (61 N. W. 543, 29 L. R. A. 287), this court quoted with

approval the following from *Hanlon v. Railway Co.*, 104 Mo. 389 (16 S. W. 233):

"This rule has, however, a qualification which is founded upon principles of humanity and is universally recognized. This qualification enjoins upon the railroad company the duty of using all reasonable efforts to avoid injury to one who has negligently placed himself in a position of danger, if the peril is known, or, under certain circumstances, by reasonable care might have been known."

Plaintiff's evidence here clearly tends to show that her peril might have been known to the trainmen in time to avoid the injury, had they but exercised the reasonable care, in the operation of their train, which their duties under the circumstances demanded.

In *Green v. Railway Co.*, 110 Mich. 648 (68 N. W. 988), a child about two years of age wandered from the premises of its grandmother to defendant's track, where it was killed by a freight train, which was being backed in the process of switching. The accident did not occur at or near any highway crossing, nor in a city or village, but upon or near a private way which crossed defendant's track, and which was daily used to the knowledge of defendant and its employees. So far as shown, the only duty of the railroad arose from knowledge of and acquiescence in such use of its track at that point. In affirming a judgment for plaintiff, this court said:

"To what extent this way was traveled, and consequently the degree of care required in the management of trains, were proper questions for the jury."

For the reasons given, we conclude that the questions of the extent to which defendant's track was traveled at the place of accident, defendant's knowledge of such use, the degree of care required in managing trains in that locality, as well as other possible

questions which might arise in that connection, should have been submitted to the jury under proper instructions.

The judgment is reversed, and a new trial granted.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

SCOOP v. W. H. WHITE CO.

1. TRIAL—DIRECTED VERDICT—EVIDENCE.

In considering the contention that a verdict should have been directed for a defendant, the testimony for the opposite party must be taken as true and regarded in its most favorable light.

2. MASTER AND SERVANT—FELLOW-SERVANTS—SAFE PLACE.

Employees of a lumbering corporation who were engaged in preparing the roads and keeping them in proper condition, sanding the track on the declivities and shoveling off snow when it was necessary, were not fellow-servants with teamsters who drove logs over the roads.

3. SAME—LOGS AND LOGGING.

Employees whose duty it is to prepare and keep a safe place for other servants perform an unassignable duty of the master.¹

4. SAME—SAFE PLACE.

And where the lumbering company employed special servants to prepare the logging roads, and assumed the obligation of keeping the roads in safe condition, the teamsters not being required to leave their teams and precede the loads over hills and steep places to ascertain if conditions were safe for passage, but where the road men were

¹ On the question of the delegability of the master's duty as to places and appliances, see note in 54 L. R. A. 63.

expected to call to teamsters and notify them whether they could safely pass over the way prepared and sanded for their use, the teamsters were entitled to rely on the presumption that the master had performed its duty of keeping the place safe for use.

5. **SAME—COMPETENCY.**

The competency or incompetency of such road men was not material except as it might throw light on the issue whether they had properly performed their duty.

6. **SAME—ASSUMED RISK.**

Plaintiff did not assume the risks of driving logs down an incline covered with snow, which both master and servant knew must be prepared by shoveling and sanding to make it reasonably safe: having received the customary notice that the work had been done upon calling to the road man, he did not assume the risk of the master's failure to properly sand the track.

7. **SAME—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.**

Evidence tending to show that plaintiff was injured because one of the hills on the logging road had not been sufficiently sanded, and that a team could not guide a load of the size which plaintiff was driving down a hill as steep as this one if the sand had been freshly covered with snow, with evidence pro and con upon the claim of defendant that plaintiff was driving at an excessive rate of speed and the accident was due to plaintiff's negligence, *held*, to present issues for the jury as to his alleged contributory negligence and assumption of risk.

Error to Charlevoix; Mayne, J. Submitted June 2, 1914. (Docket No. 6.) Decided October 2, 1914.

Case by Peter Scoop against the W. H. White Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Harris & Ruegsegger, for appellant.

Elisha N. Clink and Fitch R. Williams, for appellee.

STEERE, J. This action was brought by plaintiff in the circuit court of Charlevoix county, to recover dam-

ages from defendant for personal injuries alleged to have been sustained, on February 28, 1910, through the latter's negligence, while in its employ as a teamster at one of its lumber camps, in Warner township, Antrim county. On the trial of said cause a verdict and judgment were rendered in plaintiff's favor, and defendant has removed the case to this court for review, assigning numerous errors, the chief one being that no *prima facie* case of actionable negligence was shown by plaintiff's proofs, and the court should have directed a verdict for defendant.

Defendant was a corporation extensively engaged in logging and the manufacture of lumber, in the counties of Charlevoix and Antrim, having its principal office in Boyne City, in the latter county. Plaintiff was one of its teamsters engaged in hauling logs cut at one of its camps in a locality where the logs were hauled by sleighs a distance of about two miles on a logging road through a hilly section of country to a railroad, for further transportation to defendant's mills. While driving down one of these hills with a load of logs, plaintiff was injured by the capsizing of his load and logs falling upon him. He was 19 years of age when injured, and first went to work at this camp when 16½ years old. He was an experienced teamster, and had driven horses regularly when working in the woods, but mostly at skidding, or moving logs comparatively short distances from where they are scattered through the woods as cut to where they are piled in skidways preparatory to being loaded upon heavy logging sleighs to be hauled on the main road to the banking ground.

The road upon which the accident occurred was a logging road of the usual kind, then in regular use, constructed in the customary manner for the purpose of hauling logs in the winter time on sleighs from the skidways to the banking ground, which in this

case was at the railroad. It was made by cutting and brushing out, leveling, and grading the line about 20 feet wide as a bed for the snow, upon which hauling was done. After the snow fell, the road was broken, or put in condition for use.

To properly prepare a sleigh road for use in hauling heavy loads down steep hills, owing to the difficulty of the teams holding the loads back where it is smooth with packed snow, the snow is shoveled off, and, when occasion requires, sand is shoveled on. While hauling is in progress, men employed for that purpose, called, in the vernacular of the lumber camps, "road monkeys," or "sandmen," are put upon the road to keep it in a fit condition, particularly to shovel off the snow on the hills, where needed, and put sand on the track at intervals, to act as a brake on the runners of the sleighs and thus check the load, or, if there chanced to be too much sand, throw on snow in front of the runners, so that the loads can pass slowly and safely down, without going too fast or getting stuck. This road was thus prepared for use and was in operation, with road monkeys employed along it to keep it in condition.

Plaintiff attributes his accident to a failure to properly sand the hill where it occurred, and alleges, as a ground of negligence, that defendant did not provide him with a reasonably safe place in which to work, nor exercise reasonable care in the construction and maintenance of said road, nor in the employment of competent and trustworthy men to properly sand, care for, and keep said hill in a safe condition, but neglected the same, and permitted the road to remain covered with snow to such an extent that in driving down it, in the performance of his duties, it was impossible for him to keep his team and load under control.

In considering the contention that a verdict should have been directed for defendant, plaintiff's testimony

must be taken as true and regarded in its most favorable light.

Plaintiff claims and introduced testimony tending to show the following facts: At the time he was injured, there were from six to ten teams hauling on this road; one witness, who states there were then six teams hauling, also testifies:

"They had 25 teams, I guess, and all the teams were working on this road."

There were from seven to nine men whose duty it was to keep the road in condition while hauling was in progress; each one having a "beat." Three of these men were usually on duty along the road where it ran down the hill on which plaintiff was injured, to care for and sand the track, owing to the road at that point being steep and crooked. There were three hills in succession; this hill being the center one. The loaded teams in going from the skidways towards the banking ground first came to a smaller hill, which was not sanded, and on reaching its summit the teamsters, who could not see beyond the higher hill ahead, would stop their horses and call to the sandmen supposed to be caring for the steep stretch of road down the further side. When an answering call advised them that it was all right, they would drive on, going rapidly down the slope of the small, unsanded hill in order to make the grade to the top of the next, which was a short distance beyond, then proceeding down the steep road on the other side, where the sleighs were checked by sand thrown on the tracks, without which the horses would be unable to hold back the heavy loads, consisting of from 3,000 to 5,000 feet of logs, which were mostly hardwood. This was the regular method of making the hill. "All the teamsters had to do that."

It is undisputed that the practice of caring for and sanding logging roads at such steep places was custom-

ary and essential to safe and successful log hauling by sleighs. A witness of defendant, with 29 years' experience in woods operations, testifies to the duties of the so-called road monkeys, or sandmen, who are especially employed to keep the roads in a condition safe and suitable for hauling, and says:

"It is customary to sand steep hills where people haul logs down. All lumbermen do that."

It was also customary, after a fall of snow, to shovel off the road on the steep hills and put the track again in condition for safe hauling.

It had snowed two or three inches the night previous to this accident. That morning the teamsters first drove with their empty sleighs along the "come back" road from the camp to the place of loading. After getting their loads, they proceeded with them along the hauling road to the banking ground. Plaintiff testifies that he "was not only the first one over the road"; that his team was gentle and easy to drive; that when he reached the top of the first small hill he stopped and "hollered," and after waiting 10 or 15 minutes he received an answer that the road was all right, when he went ahead, driving down the little hill fast, and, on reaching the top of the second hill, started down it as usual; that he had always done the same thing before, and the other men drove down the first hill the same way he did, but on this occasion, when he came to go down the steep grade of the second hill, his team could not hold the load back, because there was no sand, or not enough sand, on the track; that he was watching the road and held back all he could, but was unable to control his load and team, and they went too fast, resulting in the partial or total upsetting of the load near where there was a curve or turn in the road, throwing him off. Some of the heavy logs fell upon him, causing serious and permanent

injuries. No question is raised by defendant as to his injuries or the amount of the verdict, provided he were entitled to recover. Plaintiff also introduced testimony tending to show that only one man was on the steep and dangerous part of the hill that morning; that the road monkeys were incompetent and negligent; and that the road had not been properly shoveled and sanded when he got the signal that it was all right, and started to go down it.

To the foregoing, defendant introduced contradictory testimony tending to show that in the morning the hill was shoveled and sanded; that three sandmen were distributed along it; that the foreman, Maccabee, went over and inspected the road, finding it in proper condition; that defendant was guilty of no negligence, and the accident, if the fault of any one, was caused by plaintiff's improperly managing his team and driving down the hill too rapidly.

On request of defendant the court submitted to the jury two special questions which, with the answers returned, are as follows:

"Special Question 1: Did Thomas Maccabee, on the morning and before the accident, go over the road in question and inspect its condition and find it properly sanded, in his judgment? No.

"Special Question 2: Did Thomas Maccabee, on the morning of the accident, and before the accident happened, go over the road in question and find all the road men on their respective beats? No."

Under various assignments of error, defendant contends that no *prima facie* case of negligence is shown; that the rule of safe place is not applicable; that, if there was negligence of any one other than plaintiff, it was that of his fellow-servants; that it is not shown that the accident was caused by a failure to sand; that plaintiff assumed the risk; that the verdict and

answers of the jury to the special questions are against the weight of evidence.

Where the evidence of plaintiff upon a material point is met by that of defendant, the issue is for the jury, but, in passing upon the question of a directed verdict, plaintiff's testimony is to be taken as true, and viewed in its most favorable light, as before stated, and, so viewing it in considering that question, we are unable to accept defendant's contention that the doctrine of safe place does not apply, and defendant, being a common employer, is not liable because the roadmen were fellow-servants with the teamster. Though working for the same employer, those two classes of men were in different and distinct lines of service, one to prepare and maintain a place suitable for the use intended, and the other to use it. The teamsters were not engaged in an employment where it was their duty to prepare their own place in which to work. The roadmen were so well known in the lumbering business as belonging to a special class that those in that service were favored by descriptive, differentiating titles. The duties of the road monkeys, or sandmen, and their relations to the teamsters, were analogous, in many respects, to those of section hands on a railroad and trainmen.

In *Balhoff v. Railroad Co.*, 106 Mich. 612 (65 N. W. 594), this court said:

"It is urged that section men and brakemen are fellow-servants, and that for that reason there could be no recovery. The weight of the authority is against this claim. The master owes the duty of furnishing a reasonably safe track, and this is a responsibility from which the company is not relieved by confiding the duty of construction or repairs to competent servants. Such are the master's agents, and their negligence is his negligence. They may be fellow-servants of others engaged in making the repairs, but not of those for whose use and benefit they are made."

It has been more than once, and quite recently, recognized by this court, as a general principle, that where it is the duty of an employee to make or keep a place safe for a fellow employee, and he fails in that duty, his failure is that of the master; the duty being nondelegable. *Kaukola v. Mining Co.*, 159 Mich. 689 (124 N. W. 591); *Maki v. Copper Co.*, 180 Mich. 624 (147 N. W. 533).

The rule that the duty of the master to provide and maintain a reasonably safe place, according to the nature of the employment, for the servant to perform his work in is nondelegable is too well settled and familiar to call for citation of authority. This is not one of the exceptions sometimes recognized, where the place becomes unsafe as an incident of the work done by plaintiff and his fellow workmen in the same line of labor, and where, by the nature of their contract of hiring, it was their duty to keep the place safe after it was once prepared. The teamsters were not required nor expected to leave their teams and run ahead over the hills to see if the places had become dangerous, and, if so, to make them safe. Defendant had, as was customary in such cases, not only prepared the place, but assumed the duty of keeping it reasonably safe as a place over which to haul logs, and had employed men expressly for that purpose, both to care for it and give warning, with the knowledge that down this particular hill the road grade was steep, crooked, and dangerous, requiring special vigilance, and that the teamsters, as they approached with their loads, could not see its condition until they were just starting down it. We think that, under the circumstances shown, defendant's duty to keep this place reasonably safe, according to surrounding conditions and the nature of the use to which it was put, belonged to the nondelegable class, which is not discharged by

giving directions for its performance. In such case the character and competency of the persons employed to perform the nondelegable duty become immaterial, except as the same may throw some light on the issue of whether or not the duty was performed.

The other questions raised lead more squarely into the realm of disputed facts. That plaintiff assumed the risks normally incident to his contract of hiring, which were or should have been known or noticed by him, is well-settled law. That inherent dangers attended the employment of driving these heavy loads of logs down a steep grade, after all reasonable precautions were taken to make the road safe and keep it so, was presumptively known to him, and he assumed such naturally incidental risks; but it is shown not to be reasonably safe, nor customary, nor practical to haul logs down such an incline on the smooth snow. Plaintiff and defendant both knew that, to make it fairly safe and possible to successfully use the road at that point, it must be especially prepared and maintained by shoveling and sanding, which defendant assumed to do with another class of laborers hired for that purpose, and to notify the approaching teamsters, on inquiry, when it had been so prepared for use. After receiving the customary notice that this had been done, plaintiff did not assume the unknown risk involved in its not having been done. He cannot be supposed to have taken into account, in his contract of hiring, the contingency that he might be injured by an unknown breach of duty on the part of his employer.

Defendant's contention that it is not shown the accident was caused by a failure to sand is necessarily mingled with the claim that the verdict and answers to special questions are against the weight of evidence, for there is testimony tending to show such failure.

Plaintiff testifies:

"There wasn't enough sand so that my team could hold back the load. There was snow. When I arrived at the top of the hill, I couldn't see very far from my load of logs. It was crooked. How far I could see I don't exactly know—possibly 20 feet or more. I did not know that the hill was not sufficiently sanded to enable my team to hold back its load. * * * They told me to come on, so I went. I believed it was properly sanded after they told me it was."

A teamster named Conrad, of six years' experience, who was next behind plaintiff, saw the "mix-up," and stopped his team on top of the hill. After helping care for plaintiff, he went back and proceeded with his load. Of the condition of the track when plaintiff went down it, he testifies:

"It was hilly and crooked and didn't have no sand; didn't have enough sand. * * * They needed sand on the road. After I went back from carrying Peter Scoop, I came back and took my load down to the landing. Before I went over it, they put more sand on it. * * * The team run out of the road because they didn't have no sand to hold back the load."

The only direct testimony to the contrary, which we discover in the record, is that of Thomas Maccabee, the foreman, and his father, Israel, who was working as a road monkey near the foot of this hill. Thomas Maccabee testified as to the methods of preparing and caring for this road generally, and that plaintiff was a competent teamster, though "he drove pretty fast"; that there was no place on the road where it was necessary to trot or run teams down one grade to get up the next; that he went over the road the morning of the accident, and the hill was in proper condition, with three men along it between where the accident happened and the top, one of them being his father, Israel Maccabee. The father, who does not testify to seeing his son go over the road that morning, states he was below where the accident happened and

saw plaintiff coming pretty fast; that, after he made the turn to come down where the accident happened, witness prepared to throw some sand on the road, and says:

"When I raised up I couldn't see the team, and I couldn't see the young man or nothing, * * * and I started to run up there, and the horses had been—they ran out on the snow, * * * and I ran around to see; at the log lying across his legs, and his right shoulder, or his left shoulder was sticking up between the two logs, and this big log * * * was lying on the side of his head."

He further testified the roads were well cared for; that there were seven to nine men between the top of the hill and the landing; that the only one he saw on this hill above him that morning was Chris Ike, who "seemed to take good care of his roads that winter," and who, he since heard, "got blowed up with dynamite," which accounted for his not appearing as a witness. This witness had worked in the woods for many years at "most everything," including building and caring for logging roads that ran up and down hills and gave evidence somewhat in the capacity of an expert. He testified very positively that a team "certainly couldn't" guide sleighs loaded with 3,000 or 4,000 feet of logs down a hill as steep as the one in question, if there was fresh snow on the sand.

Defendant also introduced evidence tending to show that plaintiff was guilty of contributory negligence in reckless driving; that he could and should have guided his horses safely along the road down the hill, but either caused them or allowed them to leave it; that, as shown by a plat introduced and the evidence of those who made the survey, there was no rise in approaching this hill necessitating fast driving to get over it; and much other testimony in contradiction of essential facts testified to by plaintiff's witnesses. This

conflicting testimony fairly raised issues of fact for the jury. They were submitted to the jury by a very careful, clear, full, and impartial charge of the court, in which we discover no reversible error on the material questions of law involved; and a careful reading of the record has not convinced us the verdict is so against the overwhelming weight of evidence as to demand an invasion of the recognized province of the jury, in deciding the issues of fact and demanding cancellation of their findings by setting aside said verdict.

The judgment is affirmed.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

WEBB v. BUICK MOTOR CO.

1. MASTER AND SERVANT—PERSONAL INJURIES—NEGLIGENCE—VICE PRINCIPAL.

Where the superintendent of a factory ordered an employee to chip pieces out of certain cast-iron frames, and the chips tended to fly into an adjoining passageway employed by plaintiff who worked in other departments under a different superintendent, defendant was liable for the failure to erect a screen or other protection.¹

¹ As to the liability of the master for injuries caused by splinters flying from hammers or chisels, punches, and other similar tools, see notes in 13 L. R. A. (N. S.) 679; 30 L. R. A. (N. S.) 800, and 40 L. R. A. (N. S.) 832.

The question of vice-principalship as determined with reference to character of act causing injury is discussed in a note in 54 L. R. A. 37.

2. **SAME—SUPERINTENDENT—ALTER EGO.**

A superintendent of the construction department of an extensive automobile factory, who was subject only to the authority of the defendant, and whose duties were to plan and supervise the construction work in all parts of the establishment, and do the work by his subordinates, having under him an assistant and foreman, was not a fellow-servant with an employee in the stock department, who was injured by the superintendent's neglect to use a guard or screen to prevent flying chips; for the duty which was violated was a duty which the master might not delegate so as to escape liability. His knowledge of surrounding conditions was chargeable to the employer.

3. **SAME.**

Nor is the doctrine of safe place made inapplicable because the work of chipping frames was temporary: defendant's duty required the maintenance of a safe passageway for plaintiff in the ordinary scope of his employment.

4. **SAME—EXPECTED RESULT.**

The court could not hold, as matter of law, that the accident was one which defendant need not have anticipated, when it was clear that the chips were liable to fly and strike some of the servants of the defendant.

5. **SAME—ASSUMED RISK—NEGLIGENCE.**

And the rule of assumed risk did not bar plaintiff's recovery where new dangers were created by the employer of which plaintiff had no notice or knowledge, unless the dangers were shown to have been such that it was negligent on plaintiff's part not to have seen and avoided them.

Error to Genesee; Wisner, J. Submitted June 11, 1914. (Docket No. 72.) Decided October 2, 1914.

Case by George Webb against the Buick Motor Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Carton & Bray, for appellant.

Brennan, Cook & Gundry, for appellee.

STEERE, J. In this action of tort brought to recover damages for the accidental loss of an eye charged to

have been caused by defendant's negligence, plaintiff was awarded a verdict and judgment for \$1,741, in the circuit court of Genesee county.

The injury was inflicted by a flying chip from a cast-iron frame upon which a workman was chiseling, striking plaintiff in the eye as he was walking along a passageway adjacent to where such work was in progress.

The grounds of negligence charged and relied upon are, in substance, that defendant failed to furnish plaintiff, who was one of its employees, a safe place in which to perform his duties; that it knowingly and negligently ordered the chipping to be done, and failed to erect screens and coverings around the work to prevent the chips flying, or to place barriers across the passageway, or to notify plaintiff that such work was there being done and of its attendant dangers.

Defendant's grounds for reversal are, as condensed from its numerous assignments of error and briefly stated: That no actionable negligence has been shown because, under the admitted facts and testimony in the case, the doctrine of safe place and nondelegable duty does not apply; the accident and injury could not have reasonably been anticipated and was caused by the happening of a remote contingency; the work of chipping was temporary or transitory in its nature, being connected with an equipment or construction job, was unknown and unauthorized by defendant, was the act of a fellow-servant, and plaintiff assumed the risk.

Defendant was a corporation engaged in the manufacture of automobiles in the city of Flint, having in its service over 5,000 employees working in different departments and buildings of its establishment. In its business organization there were various distinct departments in charge of superintendents, with assistant superintendents and foremen under them; the

various departments for the most part being located, or having headquarters, in separate buildings. The assembly plant, where the cars were put together and tested, was in a large two-story structure called "Factory Building No. 10," and was in charge of a superintendent named Edsall. On the first floor of this building were three large rooms known as the finishing, paint, and assembly rooms. The assembly room, in which plaintiff was injured, was 400 feet long and 72 feet wide, with a center aisle or passageway running through it north and south, lengthwise of the building, the remainder of the room on each side, of the passageway being occupied by machinery, tools, material and workmen as the nature and needs of the business of assembling required. The superintendent's office was at the extreme south end of this floor. On the day of the accident, December 29, 1910, the assembly room was not running full force, though the number of men then working in that room is variously stated by different witnesses at from 60 or 80 to 200. Some men belonging to the construction department were also working in the room upon a job of installing what are designated as "mechanical testers." The construction department had its headquarters in another building, and was under a superintendent named MacAfee. The work of this department ranged from factory to factory all over the plant, wherever and whenever occasion demanded. On the day of the accident the men of the construction department working in the assembly room were engaged, under direction of their own foreman, named Duryea, in erecting and fitting steel frames, or stands, for the metal chassis of the automobiles to rest upon in testing. These mechanical testers were mostly designed and the patterns prepared by MacAfee, the superintendent of construction. They were made by his department, and were being erected in the assembly

room by his men under his supervision. In the progress of the work it was found necessary to remove a triangular piece from each corner post or "leg" of the cast-iron, rectangular frame of the tester, and he directed the foreman to have a sufficient piece cut out, or the leg cut down to properly fit, by the men chipping or chiseling off the triangle with a cold chisel and hammer. There were two rows or sets of these metal frames on each side of the center passageway. MacAfee testified that it was his duty to look after the construction work within the factories; that he ordered the chipping to be done, and it had been going on at intervals for about two weeks when plaintiff was injured.

Plaintiff did not belong to either the assembly or construction department, but was employed in the stock department, under a different superintendent, and was directly under a foreman named Oakley, who was located in the basement of building No. 10, in charge of a room where the finishing stock was kept, and plaintiff's headquarters were with him. Plaintiff's duties consisted of caring for this finishing stock and delivering it when needed, as it might be called for. On the day in question Oakley directed him to take some "cuff plates," or running board brass, to the foreman in the finishing room, which he did, and was then directed by that foreman to deliver them at the superintendent's office, located on the same floor at the south end. His most direct route was south on that floor from the finishing room, through the paint shop and along the passageway through the assembly room. On his way and just as he entered the assembly room he met Edsall, superintendent of that department, to whose office he was directed to take the material, and showed the latter what he was carrying. Edsall said to him "Take them to the office * * * and give them to Mr. Delmore." Continuing on his

way along the passage towards the office a flying piece of metal struck him in the left eye. The sight was destroyed, and it ultimately became necessary to remove the eye. His knowledge of what the missile was, where it came from, and what caused it to fly was after-acquired. The cause and details are related by others who were present. Plaintiff testified that the passageway, with which he was familiar, was clear and unobstructed, that he thought it was about 10 feet wide, and that officers of defendant, its workmen, and others who had occasion, were accustomed to use it; that there was the noise of running machinery, pounding, and other usual sounds of work going on in different parts of the room, but he had no knowledge or notice that this chipping was being done, or any kind of work which made the passage dangerous; that he did not stop or pay any particular attention to what was being done, and walked right along about his own business, his mind being on his mission.

It was shown that the piece of metal which inflicted this injury flew from a "horse," or frame, on the east side of the passageway upon which one of the construction men, named Ebear, was chipping. He testifies:

"I did not see Mr. Webb when he came through there. I saw him a minute after he was struck. Just immediately prior to his being struck I was chipping a casting out of one of the legs of the test. Mr. Duryea instructed me to do it. * * * Mr. Duryea understood about the work. * * * He told us to use a chisel and hammer. We did it just as we were told. * * * I know who chipped off the chip that struck Mr. Webb. I did. It flew from the blow of the hammer on the chisel. I did not see him when he was struck. Mr. Craw was working right beside me at the time, at my right. When we saw Mr. Webb was struck, Mr. Craw spoke to me and swore. * * * I ran up to Mr. Webb then.

* * * I caught him by the arm and walked down to the desk with him."

In submitting the case to the jury the court said:

"I charge you as a matter of law, Mr. MacAfee was a vice principal and his knowledge was the knowledge of the company. He directed the change in the standards and approved the method of making the change, that is, the chipping, and if you find that a man of ordinary care and caution under all the circumstances would have made provision to protect the employees liable to pass along the alley from the flying chips, having regard to the probability of injury to such employees, would have erected shields or barriers or given notice of danger, then you will be warranted in finding the defendant guilty of negligence."

In the brief of defendant's counsel MacAfee is designated as a "foreman" who was instructed to do certain work, in which he made a mistake, necessitating this chipping, and it is said:

"When it was discovered that this change had to be made, several of the frames had already been installed and fastened together, and Mr. MacAfee did not consult the company or its officials, nor tell them about it, but directed that the small piece in question be chiseled off with a cold chisel and hammer, as the best and cheapest way under the circumstances."

It is argued that this resulted from his mistake, of which defendant had no knowledge or notice, and for which it was not responsible.

It appears without question from the record that MacAfee was superintendent of the construction department, in charge of a distinct organization of the plant, with his office and headquarters in a different building. The only one having any authority over him being defendant itself. His duties were to plan, look after, and superintend the construction work in all parts of the establishment, and to do the work with his own men. After receiving general instructions as

to what was desired by defendant, the details were delegated to him, and he had the full control and management of his department, with an assistant and foremen working under him according to his instructions. He says of this work:

"The proposition was put up to me to build these mechanical testers of a certain design, giving me the idea and asking me to get out the patterns, which I proceeded to do, using my own pattern maker, my own workmen putting that thing into operation. * * * After we had assembled a few of them, the foreman I had in charge of the work came to me and told me the chassis would not fit. * * * I ordered them cut to fit. * * * I assumed the responsibility of giving those orders. * * * I directed the men in my employ to cut that off; that was the only way it could be done successfully. * * * I was brought in consultation with the foreman there on the job. * * * That was my judgment of it, to cut it off with a chisel and hammer. I knew those chips would fly some, to be sure. I knew if they hit anybody it was liable to hurt; if it struck anybody in the eye it was liable to put the eye out; that is the supposition."

Witness also testified that he gave no instructions to put up shields or screens to prevent chips flying; and if that ought to be have been done he thought it would be the duty of his department to do it, but that he had no idea any one would be struck in the eye by those chips when he ordered the chipping done.

The questions of who is a vice-principal or a fellow-servant and what is the same employment are often difficult to determine and have been reviewed in endless decisions which, necessarily depending upon and varying according to the circumstances of each case, can often only be reconciled or distinguished by a full analysis of the evidence in each particular case.

We are well satisfied that the conclusion reached and instructions given by the trial court, holding as a matter of law under the undisputed facts that Superin-

tendent MacAfee was a vice-principal or *alter ego* of defendant are well founded in reason and sustained by abundant authority. The subject is exhaustively reviewed, with numerous citations of authorities in Labatt on Master & Servant (2d Ed.), §§ 1479-1553. In section 1582 it is said:

"The doctrine discussed in chapter 65, *ante*, is manifestly no bar to a servant's action, where the particular detail of the work which caused the injury was carried out under the superintendence, or by the direction, of the master himself, or of one of those employees who are deemed to be vice-principals by virtue of their rank."

Here the work was done by direction of one we deem a vice-principal. The controlling elements as applied to this case are well stated in *Dixon v. Ironworks*, 90 Minn. 492 (97 N. W. 375), where, after stating them, it was held a so-called superintendent was not, in respect to the negligence charged, a vice-principal, and in *Hunn v. Railroad Co.*, 78 Mich. 513 (44 N. W. 502, 7 L. R. A. 500), wherein it is said:

"The master may not choose to give his personal attention to his business, and may desire to put another in his place, to manage and control it for him as fully as he might do if personally present. Such person is his *alter ego*, and the master is as responsible for his acts of omission and commission, while engaged in the business intrusted to him, as if he did such acts himself. It is the duty of the master to supervise, direct, and control the operations and management of his business, so that no injury shall ensue to his employees through his own carelessness or negligence in carrying it on, or else to furnish some person who will do so, and for whom he must stand sponsor. This is true of natural persons, and it is especially true of corporations, who can only act through natural persons. Whenever the business conducted by the person selected by the master is such that the person selected is invested with full control (subject to no one's supervision except the master's) over the action of the em-

ployees engaged in carrying on a particular branch of the master's business, and, acting upon his own discretion, according to general instructions laid down for his guidance, it is his province to direct, and the duty of the employees to obey, then he stands in the place of the master, and is not a fellow-servant with those whom he controls."

The foregoing conclusion also negatives the contention that the work of chipping in the assembly room was unknown and unauthorized by defendant. Mac-Afee ordered it, and knew when and where it was done. He also knew that the chips would fly and if they hit any one they were liable to inflict injury. His knowledge as vice-principal was defendant's knowledge. It is not shown, or claimed, that the work of chipping in itself was improperly or negligently done by Ebear. He was doing it just as directed. The negligence charged is a failure to perform the nondelegable duty of preventing the chips flying to where they were liable to injure others, or to warn of the resulting increased danger in using this passageway.

It is urged that the doctrine of safe place and non-delegable duty does not apply because installing these testers, with incidental chipping, was a temporary, construction job, preparatory to carrying on the regular manufacturing work of defendant in that building; that the work was being done by the construction department and would soon end on completion of the installation. But it is also shown that in the completed building where this chipping was done the regular work of defendant in the manufacture of automobiles, as applied to the department for which that building was intended, was in progress as usual, equipped with its material, machinery, and workmen, organized and running as a separate department. Plaintiff's services were furnishing supplies to that department. He was in no way connected with or assisting in the construc-

tion work. No alterations in the passageway had been made or were in progress. It had been provided by defendant as a necessary and convenient and safe way for its employees while performing their duties there, and was constantly in use as such. In itself it was safe as before. It was not only the duty of defendant to make it safe, but to keep it safe. The kind of work begun and in progress adjacent to it by order of the vice-principal without providing safeguards or notice to those using it raises the question of negligence involved.

The familiar case of *Beesley v. Wheeler & Co.*, 103 Mich. 196 (61 N. W. 658, 27 L. R. A. 266), cited by defendant, points out the distinction. It was there held that all workmen under the charge of one superintendent engaged in the common service of constructing, or building, a ship were fellow-servants, and it is said of the facts there involved:

"The case is different from those where the master furnishes a permanent place to work, as in a ship or factory. A master's duty in such a case is to make and keep the place reasonably safe; but that rule would apply as to those working in, but not necessarily as to those constructing, the factory. Such employees would not be fellow-servants with each other, for the enterprises would not be the same. The service of one would be the erection of the completed factory; that of the other its use for the purpose for which it was designed."

Plaintiff's services were in connection with the use of the building for the purpose for which it was designed. This work of chipping in connection with installing the testers, while temporary in the sense that it would not permanently and indefinitely continue, was not a mere incident, of a short time only. MacAfee stated it had been going on about two weeks, and it was the intention to equip the assembly room with

these testing stands. Ebear states they had then chipped either eight or nine sets of horses, and plaintiff testifies that in his judgment there were about 40 sets of horses on the east side of the passageway. It can well be contended that the regular workmen in a running factory, if not entitled to the same protection as at other times, when changes are being made and new machinery installed, are at least entitled to reasonable protection compatible with existing conditions, by barriers or due notice against new dangers resulting from the disturbed surroundings.

It is urged that the court under the facts shown should have held as a conclusion of law the accident was such that it could not reasonably have been anticipated, and was caused by the happening of a remote contingency. It may be conceded that no one could foresee or reasonably anticipate that this particular accident would happen just when and as it did, but the test upon that proposition is whether the work, where and as conducted, was of such a nature and so dangerous, it should reasonably have been anticipated that some one whose duties called him there was likely or liable to be injured. We have referred to MacAfee's testimony as to his knowledge that chips would fly and the possible results. Ebear testifies of this:

"I was working on the east side of the building. From the passageway to where Mr. Webb went by I should judge it was between 15 and 20 feet. While I was working these chips that I chipped off flew all over. Some of them struck way the other side of the room; went west across this passageway. I could not say with what velocity. They would strike the west wall, some of them would. They ran all the way from an eighth of an inch to an inch long; they were about one-eighth to one-half inch thick. They flew westerly mostly. I could not say with what force they went. Some would go across the building, some half-way. * * * There could have been a sheet iron or something of that kind set up there that would have

prevented these chips from flying across the passageway. A screen could have been used if it had been fine enough."

The legal duty of an employer to safeguard against, or warn workmen of, the danger from particles thrown by clipping, shearing, or other cutting of metals has more than once been recognized in cases somewhat similar to, though not identical with, this. *Smith v. Manufacturing Co.*, 56 App. Div. (N. Y.) 528 (67 N. Y. Supp. 533); *Choate v. Mill Co.*, 27 Ont. App. 155; *Brockmiller v. Industrial Works*, 148 Mich. 642 (112 N. W. 688). In 4 Thompson on Negligence (2d Ed.), § 3969, it is said:

"The owner of a mill in which iron or steel is being chiseled, chipped, or cut, is bound to exercise reasonable care and to supply reasonable devices to prevent his servants from being injured by flying chips, splinters, or fragments of the metal; and where the exercise of reasonable care demands such a precaution, he is bound to adopt some system, or make and enforce reasonable rules, devised for the prevention of accidents of this nature, and his negligence in this particular will generally be a question for a jury."

The testimony introduced by plaintiff in this case sufficed to make the question of defendant's negligence in that particular a question for the jury.

It is urged that plaintiff assumed the risk. The rule of assumption of risk has no application where, as claimed here, new dangers are created by the employer of which the workman had no notice or knowledge, unless the dangers were such that it was negligence on his part to fail to notice and avoid them. The question of plaintiff's contributory negligence was submitted to the jury under proper instructions. We find no reversible error in this record.

Judgment is affirmed.

MCALVAY, C. J., and BROOKE, STONE, MOORE, and BIRD, JJ., concurred with STEERE, J.

OSTRANDER, J. In my opinion the doctrine of vice-principal, as applied to MacAfee, is not involved. The doctrine of safe place is involved, and in my view the conclusion stated by Mr. Justice STEERE is the correct one.

KUHN, J., concurred with OSTRANDER, J.

MINTZ v. SOULE.

1. MORTGAGES—DEEDS.

A deed may be shown by parol to have been intended as a mortgage.

2. SAME—EVIDENCE—WRITTEN DOCUMENTS.

In passing upon the proofs in such cases, courts favor written evidence over oral testimony, but are required to consider the relations of the parties, surrounding circumstances, and gather therefrom, if possible, the real intent of the parties.

3. SAME—EVIDENCE.

Evidence *held* to warrant the trial court in determining upon pleadings and proofs that a deed and contract back to the vendor did not amount to a mortgage.

Appeal from Wayne; Mandell, J. Submitted June 18, 1914. (Docket No. 112.) Decided October 2, 1914.

Bill by Samuel Mintz against Elmer F. Soule and another for the foreclosure of a land contract. From a decree for complainant, defendants appeal. Affirmed.

W. W. Wicker, for complainant.

Thomas Hislop, for defendants.

STEERE, J. This is an appeal from a decree for foreclosure of a certain land contract made by defendant Annie J. Hogan to defendant Elmer J. Soule, and by her assigned to complainant, Mintz, in connection with a conveyance to him of the property described in said contract, which consisted of two lots in a subdivision of a part of the Meldrum farm, in the city of Detroit, upon which were two double dwelling houses occupied by tenants. Said executory contract now sought to be foreclosed bears date December 1, 1911. By its terms defendant Hogan agreed to sell, and defendant Soule agreed to purchase, said property for the sum of \$9,600, payable \$1,600 down and the remaining \$8,000 in installments of \$150 each month thereafter, with interest at 6 per cent. per annum until due, and at 7 per cent. after due, payable semi-annually. The instrument was in the customary form and phraseology of land contracts and contained the usual provisions as to payment of taxes, keeping property insured, surrender of possession in case of default, etc., on the part of the purchaser, and as to the seller's right in case of default to declare the contract void, retain all payments made, and retake possession. The right to immediate possession of the premises was given to the purchaser, and it was expressly stipulated that neither party should assign his or her interest in said contract without the consent of the other. The contract was executed in duplicate, and upon the copy produced in evidence by complainant was indorsed an assignment of defendant Hogan's interest therein to him, signed by her and dated December 5, 1911. On the same date she conveyed said premises to complainant by a warranty deed, which was recorded in the office of the register of deeds on December 9, 1911.

The chief controversy in this litigation arises over the import of said deed. Complainant contends that he bought the property outright for \$7,000, subject to

the land contract, which should have resulted, with the \$1,600 paid her by defendant Soule on said contract, in defendant Hogan's realizing in cash for said property the sum of \$8,600; while the defendants claim that the deed and assignment of her interest in the land contract are, in fact and legal effect under the testimony, but a mortgage for \$7,000, which she borrowed of complainant at that time.

Defendant Hogan had been the owner of this property for a considerable time prior to this transaction. Creditors had levied on it for a claim of \$383.80, and it was incumbered by a mortgage to the Detroit Trust Company upon which there was due \$3,592.70. She was desirous of selling the property, and to that end had talked to various parties on the subject, including a real estate agent by the name of Pike and defendant Soule. Negotiations initiated in those conversations culminated in the conveyances before mentioned. Soule testified he had knowledge that a motor company contemplated purchasing additional land in that locality, and he had reason to believe this property could be advantageously disposed of to said company, for which reason he thought it was a good buy, saying: "For I knew what I could get it for"; but that after paying the \$1,600 down he found that the motor company deal in which he was "mixed up" was not going through, and he "did not care to put any further money in it."

After the tentative negotiations had approximated an understanding between defendants Soule and Hogan, the latter, because of past-due obligations which were pressing her, among other reasons, was desirous of making arrangements to realize more ready money from the sale than Soule was able to pay, and expressed a willingness to accept a less price for cash down. To that end Mr. Pike, the real estate agent whom she had consulted in regard to selling the prop-

erty, conferred with another real estate agent named Fink, informing him that Mrs. Hogan had a party who would buy the property for \$9,600 on time, but she was needing the money and willing to sell for cash for \$1,000 less; that it could be purchased for \$7,000 subject to a land contract for \$9,600, which she could make with a party who would pay her \$1,600 upon such contract, leaving the balance to go to the purchaser of the fee. Acting on this information, Fink solicited complainant to take part in the transaction and buy the property. After some consultation and an examination of the property he became interested. A general understanding was apparently reached between the parties prior to November 17, 1911, on which date, as a preliminary to the conveyances already mentioned, a written contract was entered into between defendant Hogan and complainant Mintz, which recited that she had an opportunity to sell this property on certain stated terms, which correspond with those in the contract with Soule now sought to be foreclosed; that she was "desirous, before signing said land contract, of knowing and having in writing an agreement from the party of the second part to purchase said party of the first's interest in said land contract"; and "therefore it is agreed between the parties hereto that the party of the first part agrees to deed to said party of the second part, by proper warranty deed, the above-described property, subject to said land contract above described, and assign said land contract to the party of the second part for the sum of \$7,000, and the party of the second part agrees to purchase said property on the above terms and pay therefor the sum of \$7,000 in cash," etc. In making this agreement of November 17, 1911, both parties were accompanied by counsel. It was drafted by counsel for defendant Hogan. Some discussion arose over certain provisions in the proposed instrument, in which

complainant and his counsel suggested and insisted upon a few alterations and additions which were finally agreed to and inserted before the deal was closed and the instrument signed. The following constitutes that portion of said agreement modified from the original draft, the portions in parentheses constituting the additions or alterations made before the parties signed:

"And the party of the first part agrees that of the \$7,000 the sum of \$600 is to be held (by the party of the second part) back until said party who is purchasing said property upon said land contract shall have paid to said party of the first part four payments on said land contract in addition to said first payment, amounting to \$600, when second party will collect all subsequent payments on said land contract from said purchaser and (shall retain and keep said \$600 and indorse such payments on said contract, as of the date they are made). The said party of the second part is to pay to the party of the first part a deposit of \$250 as evidence of good faith that he will carry out this contract, and the party of the first part, in case of defective title or failure to have the contract with the purchaser signed and completed as above set forth, agrees to return said deposit. * * * (First party to guarantee that said purchaser will pay said contract in full.)"

The \$250 provided for as "evidence of good faith" on the part of Mintz was paid defendant Hogan by check dated November 17, 1911, the same date as the contract, and the matters foreshadowed in this agreement were later put in more definite form and consummated, so far as then possible, as follows: The Soule land contract with Mrs. Hogan was executed on December 1, 1911, and on December 5, 1911, she assigned the same to complainant, at the same time executing to him a warranty deed of the property, as before stated. He thereupon forthwith gave a mortgage on the property for \$3,900 to a Detroit bank, with which, and other moneys raised by him, he paid

off her mortgage to the Detroit Trust Company and certain liens of her creditors on the property. On December 7, 1911, he paid her by check a sufficient amount to cover the balance of the \$6,400 then due her, at the same time giving her an order on Soule for him to pay her the first four installments of \$150 each as they fell due on his contract, to cover the \$600 mentioned in the contract of November 17th, and concluded the transaction by paying to Fink \$150, asked as a commission on the deal.

During the four succeeding months complainant credited the \$600 which he had retained on the contract in installments of \$150 each month as they fell due, and thereafter endeavored unsuccessfully to collect from Soule the payments which followed. To that end he obtained judgments against Soule in justice's court for two installments, but appeals were taken, and the cases were pending when this suit was heard.

In the meantime Soule had not only paid none of the four installments assigned by complainant to Mrs. Hogan, but by some arrangement with her did not take possession of the property as authorized by his contract, leaving her in possession and control to collect the rents, with him as one of her tenants, and on March 21, 1912, he profitably assigned to her his interest as vendee in the land contract complainant held by assignment from her as vendor, recovering from her, as she testified, all he had paid her on the contract, and \$500 besides. Complainant claimed these transactions took place without his knowledge, and on May 10, 1912, having subsequently learned of them, he wrote Soule demanding immediate payment of the amount due on his contract, saying:

"Mrs. Hogan claims that you have assigned this contract to her. This assignment I must refuse to accept or consent to, as it was made without my knowledge

or consent, and I shall look to you for the performance of this contract."

Following further pressure by complainant to collect the amount due on the contract or get possession of the property, Mrs. Hogan asserted herself as the owner in possession, both by virtue of her original title and an assignment of Soule's contract, claiming the deed and assignment by her to complainant were but security for a loan, and that his claim for the amount due according to the terms of the contract was usurious. On June 27, 1912, she tendered to him and his attorney the \$6,400 she had received, with interest, less the mortgage for \$3,900, which complainant had placed upon the property after receiving her deed, designating the tender as "in full of all moneys advanced to me to enable me to make contract with Elmer S. Soule for purchase," etc., proposing to assume said mortgage and demanding "that you return to me an assignment of all interest therein and a deed of said lands, as you have no further interest in them." In reply complainant and his attorney offered to accept from her the amount due according to the terms of the Soule contract, but declined her tender as insufficient. No further payments were made, and defendant Hogan, standing upon her tender, remained in possession of the property, asserting ownership and collecting rents until this bill was filed on November 30, 1913. No personal decree was asked or granted against her, and she was given the right to redeem, or pay up the amount due, as assignee of Soule's interest as vendee. At the time of hearing, the property rented for \$110 per month.

We need spend no time in considering the arguments and authorities cited by defendant's counsel in support of the contention that this was a usurious loan. If the deed was a mortgage in effect and the transaction was a loan, counsel's position is apparently well

taken. The only question calling for serious consideration is whether the defense has sustained the burden of establishing that this warranty deed, on its face conveying the absolute title, was, between the parties, but a mortgage to secure a loan.

It is well settled that such question is open to litigation, and the courts may so declare when the testimony impels to that conclusion. In passing upon the proof courts favor written evidence, rather than oral, but are required to consider together the writings, relations of the parties, surrounding facts and conditions generally, to arrive, if possible, at the real intent, understanding, and agreement of the contracting parties.

Defendants admit, and Mrs. Hogan states, that all preliminary talk and agreements were that the transaction would be a sale, and the papers were executed with that intent, but claims complainant just at the last refused to close the deal and buy the property, insisting that it must be a loan or nothing. She testified:

"The understanding was he was to buy, and at the last thing when coming to the settlement he said he changed his mind and did not want to buy it, but he would make a loan if I would guarantee the payment. He said he would loan \$7,000, and to secure the loan I had to give him a deed; for he did not think a mortgage would be satisfactory. That is how we got into it. That was why he insisted on changing this original agreement. The original agreement was drawn up for him to buy the property outright, but at the last he was the one that proposed making a loan, and I was willing to sell then or now, and he was the one that suggested a loan, and there was no sale, and he knows it. * * * And I said, 'I will have to buy it back, there is nothing else for me to do'; * * * and he said, 'I want to make the loan sooner than buy it. You have a right to pay it back any time you see fit, and so long as you pay interest'—

"Q. (on cross-examination). Up to the time he got the deed he had said nothing about it being a loan?

"A. No, sir."

Defendant Soule testified:

"The conversation was that Mr. Mintz was to loan the money to Mrs. Hogan on this contract."

In direct contradiction of their testimony upon this point is that of Mintz, his attorney, Pike, and Fink, the last two apparently disinterested witnesses.

Mintz positively testified that he bought the property outright, that the deed and assignment were absolute, and he had no talk with Mrs. Hogan, or any one acting for her, prior to, or at the time of, closing the deal in relation to loaning her money. His attorney who assisted in the negotiations testified that he was present most of the time, that the negotiations and papers were upon the theory and basis of a sale and nothing was said about a loan.

Pike, who acted for Mrs. Hogan as real estate agent and with whom she consulted, testified that in his work and talk with her he was operating for a sale and never heard it claimed it was anything else.

Fink, the real estate agent acting for Mintz, testified they were negotiating a sale, not a loan, that he was present when the deed passed and all the time of the meeting when the deal was closed, that nothing was said about Mintz changing his mind and making a loan, and the first he heard of any such claim was in court.

Assuming these parties are all equally credible witnesses, the testimony would seem to preponderate against defendant's contention.

It is not shown that the value of this property was more than the amount advanced by Mintz when the deed was given—a material consideration when passing upon the question of whether a deed was in fact a mortgage. Fink, a real estate agent with years of experience in the city of Detroit and familiar with

values in that locality, testified that the fair, cash value of this property was from \$7,500 to \$8,000.

We find nothing in the writings conveying the idea that this was a loan. The deed and contract between the parties are to the contrary. The preliminary contract of November 17th states that one reason for making it was because Mrs. Hogan desired an agreement in writing that Mintz would purchase the property before she closed the contract with Soule. She was not then bound by any agreement of sale to him and did not execute his contract until December 1st.

Considering the surrounding circumstances, we find there were no previous business relations, friendship, or existing indebtedness between the parties leading up to and suggesting the likelihood of an oral agreement contrary to the legal import of the papers they signed. Before that time they were strangers, with no confidence established in each other. Both had counsel. She insisted on his paying down \$250, "as evidence of good faith," and that it be in writing, while he was equally insistent on stringent security in writing signed by her that the land contract would be fully executed according to its terms. Under such conditions as are here disclosed, the writings executed by the parties are the safest and most reliable evidence of intent and agreement.

We discover none of the convincing elements in this case which sometimes move courts to construe instruments under seal as other than they purport to be, and agree with the trial court that the testimony, considered as a whole, not only fails to fairly show that this warranty deed was, in fact, only a mortgage, but is convincing to the contrary.

The decree is affirmed, with costs.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

DAVIS-FISHER CO. v. HALL.

1. BROKERS—COMMISSIONS—CONTRACTS.

The owner of real property, who, after giving to a broker the agency to sell his land on commission, interferes with a prospective buyer, cancels the broker's authority, and, knowing that negotiations for a sale are under way, effects the sale of his property by abating his price, is liable to the broker for the agreed commission or compensation.¹

2. SAME—VENDOR AND PURCHASER—MINIMUM PRICE.

Where the owner of a house listed it with plaintiff, a broker firm, and, meeting a prospective buyer to whom plaintiff had shown the realty on the previous day, informed the buyer that the firm had no authority to sell it and named a price which was less than plaintiff claimed he had fixed in his conversation with the firm, when it was claimed he had stated that he would allow plaintiff all it could obtain over \$2,800 as its commission, a verdict for the commissions of the broker was warranted by the testimony.

OSTRANDER and BIRD, JJ., dissenting.

Error to Calhoun; North, J. Submitted June 16, 1914. (Docket No. 74.) Decided October 2, 1914.

Assumpsit by the Davis-Fisher Company against George L. Hall for broker's commissions. Judgment for plaintiff. Defendant brings error. Affirmed.

Howard W. Cavanagh, for appellant.

Stewart & Jacobs, for appellee.

¹ The question of the effect upon the right to commission, of the fact that the owner sells to broker's customer at reduced price is discussed in notes in 15 L. R. A. (N. S.) 272 and 34 L. R. A. (N. S.) 1050. And as to when real estate broker is considered as procuring cause of sale or exchange which will entitle him to commission, see note in 44 L. R. A. 321.

STEERE, J. This action was begun in justice's court and removed by appeal to the circuit court of Calhoun county, where a retrial by jury resulted in a verdict and judgment for plaintiff in the sum of \$50, being the amount of a commission found due for sale of a house and lot. Defendant was a contractor and builder residing in Battle Creek, Mich., engaged, in part at least, in building houses upon lots which he owned and selling the property thus improved. Plaintiff was a company or firm engaged in the business of selling real estate on commission in said city.

It is undisputed that some negotiations were had between the parties touching plaintiff's making sale for defendant of the property in question. Plaintiff claimed and introduced testimony tending to show that, when the house was approaching completion, defendant first listed the property with plaintiff to sell on commission for \$3,000; that some effort was made by the firm to sell the same at that price, and it was shown to various parties without results, the difficulty being that the price was rather high; that later, on being asked his lowest net cash price, defendant placed it at \$2,800, plaintiff's commission to consist of whatever could be obtained above that figure, and plaintiff, accepting the proposition, thereafter continued efforts to sell the property for \$2,875.

Admitting that there was some talk with members of the firm in relation to the sale of this property, and that he had visited plaintiff's office to talk about it, defendant denied that he ever listed the property with plaintiff or gave it any authority to sell the same for him, and testified as to the price given as follows:

"I told him (Davis) that I would give him until the next day at 6 o'clock to get me \$2,800 net. I never heard from him again in regard to that, though he brought a man by the name of Veeder some time later; I cannot tell just when. He brought him there two

different times; the first time I did not give him any encouragement, because he had no money, and the second time I told him I thought I had sold the property to a man by the name of Patterson."

Members of the plaintiff firm testify and prove by others that they had at various times shown and offered the property to different parties up to the time it was sold by defendant to one Patterson, a prospective purchaser whom they first found and to whom they had shown the property, offering it to him for \$2,875. Patterson was a baggageman on the Grand Trunk railway, and Davis, a member of the plaintiff company, learning he was thinking of buying a place, solicited him as a customer and took him, with his wife and daughter-in-law, in an automobile to look at property the firm had for sale, showing them this house and lot among others. Of what took place, Patterson testifies in part:

"I told him before I started \$2,000 was as high as I would go for a place. * * * They gave me different prices for different property, \$2,800, \$2,500, \$2,750 for another one. * * * The Davis-Fisher price (for this property) was \$2,875. I made them no reply. * * * Mr. Davis said about this house that it was a very nice house, and he would recommend the contractor very highly, and that the house was well built, and he would be glad to show me through it. I said I did not care to go through the house because it was above my price. * * * He done most of the talking, and my wife was with me and my daughter-in-law. * * * I told him if he had no objections I would look at these different places the next morning, and if I found anything that suited me, I would come back the next morning, and if not, there was nothing doing."

This was on October 23d; the following day, October 24th, Patterson visited the property and there met defendant. The place apparently suited him, and there was something "doing," but he did not go back to plaintiff. He informed defendant that Mr. Davis

had shown him the place, and was answered that no real estate firm had the property for sale; that defendant owned it and would sell it for \$2,800. Patterson thereupon dealt with defendant and bought the property of him at that price. Being asked, "And you bought it because Mr. Hall represented to you that Davis-Fisher Company did not have it for sale?" he answered, "That is the idea exactly."

After the sale was consummated, defendant denied that he had listed the property with plaintiff and refused to pay any commission. Plaintiff demanded a commission of \$75 for having first found a prospective purchaser who was favorably disposed to the property and was examining it on plaintiff's solicitation and offer, which had not been refused, when defendant interfered and consummated the sale himself.

In submitting the case to the jury, the court charged them that, if plaintiff had failed to show, by a preponderance of evidence, that the property was in its hands, listed for sale by defendant, there could be no recovery in any event, and, amongst other things, gave the following instructions, upon portions of which error is assigned:

"And I say to you along that line, if an owner places his property in the hands of a real estate broker for sale, it is the duty of the owner to deal honestly and fairly with the broker, and it is the right of the broker, on finding a prospective customer, to deal with such customer until a sale is made, or until the customer has refused to purchase, at least during a reasonable period of time; and if the owner voluntarily interferes with such sale, and induces the prospective purchaser to deal directly with him, and by such interference and direct dealing the owner is able to sell to the customer whom the broker has interested in the property, then I charge you it becomes the duty of the owner to pay the agreed commission to the broker, and in that case if you find that the owner, Mr. Hall, knew that

the plaintiff was negotiating with Mr. Patterson, and Mr. Hall voluntarily solicited Mr. Patterson to purchase the property before the negotiations between Mr. Patterson and the plaintiff were broken off, and by such solicitations did sell the property to Mr. Patterson, then I charge you plaintiff should recover. If you find the defendant placed the property in plaintiff's hands for sale, and if the plaintiff is entitled to recover in this case, the measure of recovery would be this: That the defendant should pay to it the ordinary amount paid for commissions for such sales. The testimony in this case being that they varied from $2\frac{1}{2}$ to 3 per cent. of the purchase price, bearing in mind that the amount awarded cannot exceed the sum of \$75, because under plaintiff's own statement of this case, had it been enabled to consummate this deal with its prospective customer, its profit would only have been \$75, therefore, under the circumstances, it cannot recover more than that."

It is well settled, by abundant authority in this State and elsewhere, that when a real estate owner, who has given to a broker an agency to sell lands on commission, with knowledge that such broker has found and is negotiating for a sale with a prospective purchaser, steps in, cancels the broker's authority, and himself effects a sale to the broker's customer by an abatement of the price, the broker is entitled to his commission. *Heaton v. Edwards*, 90 Mich. 500 (51 N. W. 544); *McGovern v. Bennett*, 146 Mich. 558 (109 N. W. 1055); *Glascok v. Vanfleet*, 100 Tenn. 603 (46 S. W. 449). Many authorities on the subject of the effect of a principal's default, negligence, or fraud on a broker's commission are collected in the annotation of *Brackenridge v. Claridge & Payne* (Tex.), found in 43 L. R. A. 593. The spirit and reason of this doctrine is well sustained by the cases cited under "Principal's Interference with Broker," on page 606 of 43 L. R. A.

The jury found as a fact in this case, with abundance

of testimony to support the finding, that defendant did list the property with plaintiff for sale. If so, and it must be taken as true in considering further questions, he deceived Patterson, plaintiff's prospective customer, and through falsehood induced him to deal with himself by stating that he sold his own property, that the house and lot belonged to him, and no real estate firm had it for sale, knowing at the same time that Patterson's then presence on the premises was the result of Davis' having shown and offered to sell him the place.

Defendant contends that, by the alleged terms of its agency, plaintiff's right to a commission depended squarely upon its ability to sell the property for a greater sum than \$2,800, which it failed to do, and no right could arise from the fact that defendant subsequently sold it for a less price than plaintiff offered it, to the party with whom plaintiff had unsuccessfully negotiated—citing *Gilmore v. Bolio*, 165 Mich. 633 (131 N. W. 105, 34 L. R. A. [N. S.] 1050); *Wood v. Smith*, 162 Mich. 334 (127 N. W. 277.) In the latter case the question involved was whether a broker was the procuring cause of sale, and it was held under the testimony to be a question of fact properly submitted to the jury. It is undisputed in this case that plaintiff cannot recover unless it is shown to be the procuring cause of the sale. In *Gilmore v. Bolio*, *supra*, the facts more closely resemble those in the instant case, with the marked distinction that the deal was off, and all negotiations between the broker and prospective purchaser had ended by a refusal of the latter to buy the property on the terms proposed. Six weeks later he bought it of the owner for a less price. No interference of the principal with pending negotiations of a broker was involved there, which is the gist of this case.

It is urged that no customer is shown to have been produced willing to pay more than \$2,800 for the prop-

erty; that Patterson did not negotiate with Davis for this property, but, on the other hand, in effect refused it, saying nothing in reply to Davis' laudation of it, except that \$2,875 was above his price, and therefore a verdict should have been directed for defendant on the ground that plaintiff had not made a *prima facie* case by its proofs. Error is also assigned on refusal of the court to allow Patterson to answer questions as to his intent, and whether he would have paid more than \$2,800 for the property, a contingency which he never was called upon to decide, owing to defendant's interference.

Is defendant in a position to say that plaintiff would not have made the sale? It is undisputed that Davis, for plaintiff, first secured Patterson as a possible customer who had intimated a desire to purchase a house and lot, and took him with members of his family to look at places plaintiff had for sale; that, amongst others, he drew their attention to this property and urged its desirability, stating the price asked for it. Patterson discreetly looked and listened and said little or nothing as to this or any other property, so far as shown. It was but a natural initiation of negotiations. He guardedly stated that the next morning he would look over the properties which had been pointed out for sale, and, if he found anything to suit him, would pursue the subject. That he was then favorably impressed with this property and, knowing the price asked, went back to look it over, was suited with it, and bought it of the owner at the price he first asked, which was but \$75 less than that asked by plaintiff, is at least evidence for a jury that plaintiff was not only the moving cause of the subsequent sale made by defendant, but that it had so interested Patterson in the property, when showing it to him, that he was yet a promising prospective purchaser, who not only had not refused plaintiff's offer, but with whom it might

well pursue negotiations with fair prospects of success, but for the fact that on the very next morning defendant, meeting him for the first time, and learning that he was examining the property at the instance of plaintiff, cut off further negotiations with it and all possibility of its effecting a sale by denying its agency, reducing the price, and inducing the customer to deal with him. Under such circumstances, when it is found as a fact that defendant had listed the property with plaintiff, we do not think it reversible error to exclude the then unexpressed and untested thought or intent of the purchaser as to a future contingency rendered impossible by defendant's conduct, nor is defendant's claim that the sale could not have been consummated by plaintiff, of conclusive force because, conceding defendant had listed the property with the broker, he is seeking by such claim to take advantage of his own wrong and interpose his own bad faith in his defense. There was abundant evidence to support plaintiff's claim that it was the moving cause of the sale made, and that defendant wrongfully interfered with and broke up plaintiff's pending negotiations with a prospective customer, and made the sale himself, thereby becoming liable to plaintiff for its commission. The case was one for a jury, and was submitted under proper instructions.

Upon the record, taken as a whole, we find no reversible error, and are of the opinion the judgment should be affirmed.

MCALVAY, C. J., and BROOKE, KUHN, STONE, and MOORE, JJ., concurred with STEERE, J.

OSTRANDER, J. (*dissenting*). In my opinion, my Brother STEERE has not answered the contention of appellant that there is no testimony tending to prove that plaintiff could have sold the property to Patterson or to anybody for more than \$2,800. Unless it made

a sale for a greater sum, plaintiff was not entitled to a commission. Plaintiff had no exclusive right to sell the property. It knew the owner's price and that it or any one could secure the property from the owner, at any time, for \$2,800. A jury has awarded plaintiff a commission of \$50, but upon no testimony that plaintiff might have sold the property to Patterson for \$2,850. The testimony just as well sustains an award of \$75. or of \$25, or of \$5. It is evident the jury thought defendant had acted rather meanly, and that he ought to pay something on account of his behavior. But plaintiff sued to recover a commission, which, because of defendant's improper action, it had lost.

The judgment should be reversed, and no new trial granted.

BIRD, J., concurred with OSTRANDER, J.

REIS v. APPLEBAUM.

FRAUD—EQUITY—ADEQUATE REMEDY AT LAW.

A bill for a money judgment, based solely on averments of fraud, is demurrable on the ground that the complainant has an adequate remedy at law.

Appeal from Saginaw; Gage, J. Submitted June 22, 1914. (Docket No. 48.) Decided October 2, 1914.

Bill by Joseph Reis and others against Isaac Applebaum and others for fraudulent misrepresentations. From an order sustaining a demurrer to the bill of complaint, complainants appeal. Affirmed.

Henry E. Naegely and E. A. Snow, for complainants.

Alex J. Groesbeck, for defendants.

KUHN, J. This is an appeal from an order sustaining the demurrer of several of the defendants herein. The allegations of the bill of complaint are fully set forth in the opinion of this court in the case of *Reis v. Applebaum*, reported in 170 Mich. 506 (136 N. W. 393). The grounds for demurrer are as follows:

(1) The complainants are not judgment creditors of either or any of the defendants and therefore are not entitled to maintain their bill of complaint.

(2) The complainants have not, in and by their bill of complaint, stated such a case as entitled them to any relief at the hands of a court of equity.

(3) Under the laws of this State, and particularly chapter 269 of the Compiled Laws of 1897, this court has no jurisdiction of the matters contained in said bill.

(4) The bill of complaint states no legal or equitable cause of action against these defendants, shows upon its face that the complainants have no claims of any nature against these defendants, and is purely vexatious in character.

(5) Under the laws of this State a court of equity has no jurisdiction of the facts and circumstances set forth in the bill of complaint.

An examination of the bill of complaint discloses that the allegations of fraud relied upon are based on the charge that the articles of association set forth that there were \$100,000 paid into the company at the time the same was incorporated, whereas in fact said statement was false, untrue, and fraudulent, and that this claimed fraud was known to the defendants, and one of them, defendant Applebaum, purchased the railroad at a foreclosure sale. It seems that when this charge was made in the bill the complainants were laboring under a misapprehension of the facts, as the articles of association which are made a part of the

bill show that the capital stock of the company was \$1,000,000, 10,000 shares of \$100 each, and that the road was to be constructed from the city of Saginaw to the city of Flint and to the village of Vassar, in the county of Tuscola, the length of the line to be 45 miles. An affidavit attached to the articles of association in accordance with section 6396, 2 Comp. Laws, states that stock to the amount of \$1,000 per mile of the railway has in good faith been subscribed, and that 10 per cent. thereof has been paid as required by law. Thus it would appear that all that was paid in at the time of organization, as set forth in the articles, was \$4,500, instead of \$100,000 as claimed by the complainants.

It is now contended, however, that as the bill states that no money whatever was actually paid in, it makes no difference, so far as the fraud is concerned, whether the amount was \$4,500 or \$100,000. There is some question whether the language of the bill is specific enough to warrant this interpretation, but to our minds it is immaterial, because the important question is whether the general charge of fraud upon which complainants rely is sufficient to give the equity court jurisdiction. The specific relief prayed for, which in effect asks for the entry of a money judgment, is as follows:

“That the legal liability and responsibility for the issuance and payment to the complainants of the several amounts of money represented by the bonds aforesaid of complainant may be aided, established, and decreed against the said defendants and in favor of the said complainants, and that said defendants may be required by an order of the court to pay to the complainants the several said sums of money according to the tenor and effect as provided for in the bonds aforesaid of said complainants.”

The learned trial judge in sustaining the demurrer was of the opinion that “fraud alone is not a sufficient

ground for a court of equity in this State to assume jurisdiction," and in this conclusion he is sustained by the recent decisions of this court. A clear statement of the rule applicable is found in the opinion of this court in *Laubengayer v. Rohde*, 167 Mich. 605, on page 610 (133 N. W. 535), where Justice STEERE, speaking for the court, said:

"The most serious ground of demurrer urged is that complainant has an adequate remedy at law, which precludes jurisdiction in equity. That courts of law and equity have concurrent jurisdiction in cases of fraud is well settled, and it is also well settled in this State that a suit may be planted on the chancery side of the court where complainant is shown entitled to relief especially equitable. The question has been before this court in numerous cases, and thoroughly discussed. A comprehensive review of many of the decisions is to be found in *Fred Macey Co. v. Macey*, 143 Mich. 138 (106 N. W. 722, 5 L. R. A. [N. S.] 1036). In *Detroit Trust Co. v. Old National Bank*, 155 Mich. 61 (118 N. W. 729), it is said:

"In this State equity has not taken jurisdiction of cases where a suitor has a full, complete, and adequate remedy at law, unless it is shown that there is some feature of the case peculiarly within the province of a court of equity."

"It was further pointed out in that case, as reasons for sustaining a demurrer, that the allegations in the bill did not show need of an injunction, or of a discovery, or of an accounting, or of specific performance, or the reformation or cancellation of a written instrument, and there was nothing to indicate that a judgment against defendants would not be perfectly good.

"In the case at bar there is no claim that defendants are financially irresponsible, or a judgment against them doubtful; according to the scheme of complainant's bill, all he seeks and all he is entitled to in the end is a money judgment for the damages he has sustained."

In addition to cases cited in this opinion, see *Mack v. Village of Frankfort*, 123 Mich. 421 (82 N. W. 209);

Berger v. Roe, 179 Mich. 184 (146 N. W. 200) ; *Levitan v. Houghton National Bank*, 182 Mich. 30 (148 N. W. 388). The order sustaining the demurrer is affirmed, with costs.

MCALVAY, C. J., and BROOKE, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

KOSKELL v. NEWPORT MINING CO.

1. MASTER AND SERVANT — MINES AND MINING — TRAMMERS—FELLOW-SERVANTS.

Trammers in a mine who with the miners prepare a part of the drift or other portion of the mine, which has been newly blasted, for the timbermen to place supports, are fellow-servants with miners, all being engaged in creating or constructing a safe place to work; so that neglect of the miners to properly sound and bar down the unsafe rock was the act of fellow-servants of a trammer who was engaged in work in an untimbered portion of the drift.¹

2. SAME—ASSUMPTION OF RISK.

Upon plaintiff's testimony that the miners did not trim down or sound the place at all, he must be held to have known and assumed the risk of the failure to perform that duty, although one of the miners assured him that the place was safe.²

¹ As to the liability for injury to employees in mine through negligence of fellow-servant, see notes in 50 L. R. A. 437 and 461.

² On the question of the servant's assumption of risk from changing condition of excavations in mine during progress of the work, see note in 19 L. R. A. (N. S.) 352.

For the liability of the master for injuries due to dangerous condition of earth and rock left after blasting, see note in 48 L. R. A. (N. S.) 1123.

Error to Gogebic; Cooper, J. Submitted June 10, 1914. (Docket No. 57.) Decided October 2, 1914.

Case by Edward Koskell against the Newport Mining Company for personal injuries. Judgment for defendant upon a directed verdict. Plaintiff brings error. Affirmed.

Le Gendre & Driscoll, for appellant.

C. W. Westerman (*Chas. F. Fawsett*, of counsel), for appellee.

KUHN, J. The plaintiff has appealed from a verdict directed for the defendant by the trial judge. At the time of his injury he was working for the defendant company as a trammer, and had been engaged in this employment for a period of three months. The accident occurred in the main east drift of the seventeenth level, about 1,000 feet easterly from the shaft, and was caused by the fall of about a ton of what the miners call "slip ore" from the side of the drift, about three feet in toward the breast from the then most easterly set of timbers. On the day of the accident, about 12 o'clock midnight, a blast took place, and at 1 o'clock the miners and trammers went back to work. The trammers went about cleaning up the track, working under the timbers, and while they were doing this the miners Johnson and Trasti examined the untimbered place. Upon receiving an assurance from Johnson that the place was safe, the plaintiff went into the untimbered place and started to shovel ore, and worked there until 4:30 a. m., when his injury occurred.

The mining operation in which the men were engaged is explained by the witness Johnson, the miner, who testified on cross-examination:

"The timbermen put the timbers in, but the miners

and the trammers get the place ready for the timbermen to put in the timbers, but they can't put in the timbers until after the trammers have gotten out the dirt and cleaned the place out. A miner usually gets hurt and dies more often than the trammer does. He doesn't like to get hurt, no one does. When we are making this place safe by trimming it down and sounding it, we are doing that for our own protection as well as the trammers, and the trammers are right there with us, and they can look and see for themselves also; they have eyes of their own; they can look for themselves. It may have been a little over three months that Koskell had been working with me as a trammer. I was working in that drift, making that drift that he got hurt in, about three months. He was working right along with me all the time that I was helping to make that drift and could see what kind of ground it was that I was going through."

The testimony shows that the work the men were engaged in was mining the ore, and incidentally making a permanent place to be used in future mining operations. The place which was being made was the timbered passageway along which the ore was to be carried as it was mined. In working in these drifts the work of the miners was to make the holes and blast, and after the blast to pick it down and sound it and get the place ready for the trammers to take out the dirt. After a space sufficiently large had been blasted and cleaned out, the timbermen put in timbers. But this cannot be done until the trammers have taken out the loose ore and dirt, and the necessary space has been cleared.

The unsafe place in which plaintiff was injured was an incident of the work, and was created by the plaintiff's coservants. It is well-established that the doctrine of safe place and nondelegable duty does not apply to a place while in the process of construction and being made safe.

The facts in this case, in our opinion, clearly bring it within the rule stated in the case of *Petaja v. Mining Co.*, 106 Mich. 463 (64 N. W. 335, 66 N. W. 951, 32 L. R. A. 435, 58 Am. St. Rep. 505), affirmed in *Karpinen v. Mining Co.*, 154 Mich. 528 (118 N. W. 1118); *Dunn v. Dredge & Dock Co.*, 161 Mich. 551 (126 N. W. 833); *Risku v. Iron Cliffs Co.*, 163 Mich. 523 (128 N. W. 747); *Kaaro v. Mining Co.*, 178 Mich. 661 (146 N. W. 149). Under the decisions of this court, the miner, trammer, and timbermen, being all engaged in the one common undertaking of driving the drift and taking out the ore, were fellow-servants, and if according to the theory of the plaintiff the miners neglected their duty and did not properly examine the excavation and trim down and sound as should properly have been done, their neglect is that of a fellow-servant and does not bind the defendant.

The plaintiff testified that on this occasion the miners did not trim down or sound the place at all, although he knew it was customary for them to do this in order to determine that the place was safe. If after seeing this neglect of duty the plaintiff elected to continue to work, it must also be said that he assumed the risk.

Our attention is called to the case of *Scendar v. Copper Co.*, 169 Mich. 665 (135 N. W. 951), which is clearly distinguishable from the case at bar. It appears in that case the plaintiff was instructed by the employer that the place would be kept safe for him, and that he must abide by the judgment of the captain, shift boss, and miners as to whether or not the place was safe, and was thus relieved of the necessity of looking out for himself. Neither does it appear that the plaintiff had notice that they were negligent in the performance of the duty which they were required to perform.

Under the evidence in this case a verdict was properly directed for the defendant, and the judgment is therefore affirmed.

MCALVAY, C. J., and BROOKE, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

ROLPH v. ROOD.

1. WILLS—ESTATES OF DECEDENTS—PARTITION—NECESSITY OF PROBATE—PARTIES.

In order to obtain a sufficient title upon which to found a bill in partition proceedings by one of the devisees who claims title through the will of a deceased ancestor, resident of a foreign jurisdiction, it is necessary that the instrument be admitted to probate in the courts of this State. 3 Comp. Laws, §§ 9281, 9282 (4 How. Stat. [2d Ed.] §§ 10991, 10992).

2. ESTATES OF DECEDENTS—WILLS—PROBATE.

Administration of a will in the probate courts of the State of Illinois without ancillary proceedings in Michigan is insufficient to pass title to the devisees of real property under the will of a decedent who resided in Illinois, owning realty in this State.

3. PARTITION—DEVISES.

In partition brought by the devisees under the will of their deceased mother, no sufficient title to support the bill was established by proofs that the will under which the heirs took title had never been presented for probate in the county in which decedent resided and in which the land was located; the will having been admitted to probate in a foreign State where the devisor resided when she died.

Appeal from Kalamazoo; Stewart, J. Submitted June 17, 1914. (Docket No. 93.) Decided October 2, 1914.

Bill by Charles N. Rolph and others against William C. Rood and others for partition. From a decree for defendants, complainants appeal. Affirmed.

Lincoln H. Titus, for complainants.

Clare H. Stearns, for defendants.

BROOKE, J. Leonidas Rood of the county of Kalamazoo, Mich., died on the 13th day of October, 1897. He left a last will and testament, by the terms of which he left the use of 100 acres, his home farm, to his wife, Electa M. Rood, for the term of her natural life. The testator then devised the fee in said home farm of 100 acres to his four children, share and share alike. The wife of Leonidas, Electa M. Rood, died on the 18th day of May, 1912. One of the four children, devisees of the fee of said farm, was Mary E. Rolph. The domicile of said Mary E. Rolph was Seneca, in the State of Illinois, where she resided for many years. She made and executed a last will and testament on the 7th day of December, 1899, in the State of Illinois, and on the 22d day of February, 1911, she made, executed, and annexed to said will a codicil. She died on the 16th day of March, 1911, a little more than one year prior to the death of her mother. By the terms of her will she devised all her real and personal estate to one Hosmer Chapman in trust. The terms of the trust are not important, except that the estate was to be used for the benefit of her children and finally to be paid to them. By the terms of the codicil, she changed her appointment of administrator from Hosmer Chapman to C. H. R. Thomas and made the following change with reference to her property:

"First. All money coming to me after my death (crops excepted) from my father's estate or from any brother or estate of such to be divided and any of my children over twenty-three years of age to have their share at once—while the shares of children under twenty-three are to be put at interest until they reach that age when it is to be given to them."

This will was duly admitted to probate in La Salle county, State of Illinois. No ancillary administration was had upon the estate of Mary E. Rolph in the State of Michigan. The complainants are the heirs at law and devisees under the last will and testament of Mary E. Rolph. Their bill is filed for the purpose of securing partition of the farm, the fee in one-fourth of which was devised to their mother, by Leonidas Rood, their grandfather. To the bill of complaint was attached an alleged copy of the will of Mary E. Rolph and an alleged copy of the order admitting said will to probate in the State of Illinois. An answer was filed admitting the material allegations of the bill, but denying the right of complainants to partition of the farm in question. Upon the hearing, when it had become apparent to the court that no ancillary administration had been had in the State of Michigan, a decree was entered dismissing the bill. From this decree complainants appeal.

Counsel for appellants in his brief argues and cites many cases in support of the argument that heirs have such an estate in possession of the inheritance as will enable them to maintain a bill in equity for partition, notwithstanding the existence of the power of the administrator to take possession under the statute, and that partition need not await the full settlement of the ancestor's estate. We find no difficulty in agreeing with counsel for appellant as to the legal principles stated in his brief. We are, however, of opinion that they are not applicable in the case at bar. The com-

plainants do not take the estate of Mary E. Rolph as heirs, but they must of necessity take it as devisees under her will, because in that will she disposed of her entire estate, both real and personal. There is therefore no intestate estate.

Section 9281, 3 Comp. Laws (4 How. Stat. [2d Ed.] § 10991), provides:

"No will shall be effectual to pass either real or personal estate, unless it shall have been duly proved and allowed in the probate court as provided in this chapter, or on appeal, in the circuit court or Supreme Court; and the probate of a will of real or personal estate, as above mentioned, shall be conclusive as to its due execution."

Section 9282 (4 How. Stat. [2d Ed.] § 10992), provides:

"That any will duly admitted to probate without the probate court of any county in this State in which the testator left real or personal estate, and in the place of the testator's domicile, may be duly admitted to probate and recorded in this State by duly filing an exemplified copy of said will and of the record admitting the same to probate; and proceeding in the manner hereinafter provided."

As complainants must take as devisees under the will of Mary E. Rolph and not as her heirs, and as her real estate in the State of Michigan must pass to them by virtue of her will, we are of opinion that ancillary administration must be had under the terms of the statute, *supra*.

The decree of the circuit court is affirmed, with costs.

MCALVAY, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

CLOSSER v. McBRIDE.

1. TAXATION—NOTICE OF REDEMPTION—SUBSEQUENT ASSESSMENT—AMOUNT TO REDEEM.

In giving notice to the owner of lands that have been sold for unpaid taxes, the purchaser may properly include in the amount required to redeem the taxes for previous years which remain unpaid, and which the tax purchaser was required to pay in order to obtain title.

2. SAME—DESCRIPTION.

The tax title was not void because in giving such notice he grouped in one parcel the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ and the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, or the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, as it appeared in his tax deed, although the assessments for previous years were levied and returned against the separate parcels.

3. SAME—AMOUNT REQUIRED TO REDEEM.

But the notice should disclose the exact and correct amount which may be required for redemption, or it will be invalid.

4. SAME.

Hence a notice which included in the total named as the sum required to redeem from the tax title, the tax of a year following that for which the property was sold, including penalties based on the additional tax, was invalid, since the notice demanded an excessive amount.

5. SAME—TRESPASS.

The tax notice being void, defendant became a trespasser in entering into possession and retaining possession of the real property.

6. SAME—DEEDS—RIGHT OF REDEMPTION.

A purchaser by getting a quitclaim deed from the holder of the record title from the government secured the right to redeem from the holder of a tax deed who had failed to serve a valid notice.

7. SAME—RIGHT OF REDEMPTION.

Having deposited with the register in chancery the sum required to redeem the lands, plaintiff was entitled to maintain ejectment without securing a reconveyance of the property. Act No. 229, Pub. Acts 1897, § 141 (1 How. Stat. [2d Ed.] § 1912).

8. SAME—EJECTMENT—IMPROVEMENTS.

Nor was the occupier entitled to recover for improvements under 1 Comp. Laws, § 3927 or § 10995 (1 How. Stat. [2d Ed.] § 1875, 5 How. Stat. [2d Ed.] § 13195).¹

Error to Chippewa; Fead, J. Submitted June 18, 1914. (Docket No. 118.) Decided October 2, 1914. Rehearing denied December 19, 1914.

Ejectment by Dayton W. Closser against James McBride. Judgment for plaintiff. Defendant brings error. Affirmed.

John W. Shine, for appellant.

Davidson & Hudson, for appellee.

BROOKE, J. This case was tried before the court without a jury. The opinion of the learned circuit judge fully states the facts involved and the law applicable thereto. We, therefore, adopt it as our own. It follows:

“FINDINGS OF FACT.

“This is an action of ejectment brought by the plaintiff, claiming to be the owner of the original title to the lands herein described, against the defendant, who claims title by virtue of a certain tax deed and notice and possession thereunder for the period of five years and upwards. The land is described as the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 1, township 46 north, of range 2 west, in Chippewa county, Mich.

“(1) Plaintiff is the owner of the original title to

¹ As to the right of one holding under invalid tax deed to be reimbursed for improvements, see note in 34 L. R. A. (N. S.) 1144.

said lands by virtue of the following conveyances: (a) Patent from the United States to Joseph Miller, dated May 25, 1885; (b) warranty deed from Joseph Miller to E. S. B. Sutton, dated August 2, 1883; (c) quitclaim deed from E. S. B. Sutton and wife to Dayton W. Closser, dated February 12, 1912.

"(2) It is conceded that defendant is in possession of the premises, claiming ownership under tax deed and notice. It is also conceded that demand for possession was made upon him by plaintiff, and possession was refused.

"(3) The tax deed under which defendant claims is dated July 29, 1903, and was issued for the taxes of 1899. He purchased the lands at the county treasurer's sale in May, 1902, for the sum of \$9.67, and received a certificate of purchase therefor. After waiting one year, he returned the certificate to the auditor general and received his tax deed.

"(4) At the time of the purchase in May, 1902, defendant was also required to purchase said lands for the taxes of 1897 and 1898, paying therefor the sum of \$29.08; it then appearing on the State tax land list for those years. For the taxes of 1897 and 1898, the defendant received from the county treasurer two certificates of purchase which he still holds and for which he has not received deeds.

"(5) For the taxes of 1897 and 1898, the land appears described in 40-acre parcels, *i. e.*, as the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ and the N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, respectively, in the delinquent returns, proceedings for sale, tax record, State tax land list, and certificates of purchase. For the taxes of 1899 the land was assessed as one description, *i. e.*, as the N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, and so appears in all proceedings.

"(6) On May 4, 1903, the defendant also paid the taxes of 1900 (\$6.19), but not as a condition of purchase, and for which he received a certificate of redemption.

"(7) On August 28, 1903, the defendant caused a tax notice to be served personally on the original owner of record, E. S. B. Sutton, and also on the Duluth, South Shore & Atlantic Railway Company. The railway company apparently has a track over part of the land, but its title does not appear in the evi-

dence. No question is raised as to such title or service. The notice, with the return of the officer, was filed in the office of the county clerk on September 3, 1903.

"(8) The tax notice is in the statutory form, the controversial part of which is as follows:

"Description of Land.

"Situating in Chippewa county, State of Michigan. Lot. Block. Plat, addition or other description, giving name of city or village when necessary. N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of sec. 1, town 46 N. range 2 W.; taxes paid for the years 1897 and 1898, \$29.08, 1899, \$9.67, 1900, \$6.19, making in all \$44.94.'

"(9) At the time the tax notice was served, the land was wild and uncultivated and was not in actual possession of any one. About the latter part of May or the fore part of June, 1904, the defendant took possession of the land and has held it continuously ever since. He has made improvements on the premises which have enhanced the value of the land \$185. He took off crops at different times, the profits of which would amount to about \$48. The possession of the defendant has been of such a character as would, in a proper case, give title by adverse possession.

"(10) On March 13, 1912, plaintiff deposited with the register in chancery of Chippewa county the sum of \$82.50 with the certificate of the auditor general, under section 143 of the tax law, for the purpose of redeeming the lands from defendant's tax purchase. On April 3d, he deposited an additional \$5 for the same purpose, making his total deposit \$87.50, which sum is still in the hands of the register for the purpose of such redemption. The register, on March 29, 1912, notified defendant of the deposit by letter. Defendant has not accepted the money nor given a quitclaim and release to plaintiff.

"(11) All files and records and exhibits form part of these findings of fact.

"CONCLUSIONS OF LAW.

"1. Defendant's tax deed was valid.

"2. Defendant properly included the taxes of 1897 and 1898 in the tax notice. They had been paid as a condition of purchase. *Backus v. Cowley*, 162 Mich. 589 (127 N. W. 775).

"3. The tax notice was not void because the descriptions were grouped. The description in the notice conformed to that in the deed. *Loud v. O'Brien*, 167 Mich. 209 (132 N. W. 495).

"4. The tax notice was void, for the reason that it included the taxes of 1900, which were not paid as a condition of purchase. This question has not been passed upon directly by our Supreme Court, but it has been held that where there are several descriptions in the notice, it must show the amount paid for each description during the whole time covered by the notice. *Haden v. Closser*, 153 Mich. 183 (116 N. W. 1001); *Jackson v. Mason*, 143 Mich. 357 (106 N. W. 1112); *G. F. Sanborn Co. v. Johnson*, 148 Mich. 406 (111 N. W. 1091).

"It is a fair construction of the language of section 140 of the tax law * * * which requires that the notices given shall indicate the sum required to be paid to obtain a reconveyance of any description of land in the tax deed, whether sold and held for the taxes of one or those of several years.' *John Duncan Land, etc., Co. v. Rusch*, 145 Mich. 1 (108 N. W. 494).

"The notice should disclose the exact and correct amount necessary to redeem, or it will be invalid. *Teal Lake Iron Mining Co. v. Olds*, 178 Mich. 335 (144 N. W. 845); 37 Cyc. p. 1402.

"It is evidently the purpose of the notice to inform the original owner that his land has been sold for taxes and, also, of the amount necessary to redeem from the sale. Such, also, is the effect and import of the foregoing decisions. The notice here does not conform to this requirement. The original owner could not, from the notice itself, compute the correct amount he would be required to pay in order to redeem. Even though, as defendant contends, he should be entitled to reimbursement for the 1900 tax to protect his tax lien, he would not be entitled to penalties thereon, which the notice demands. The 1900 tax is not separated, but appears as though it were paid as a condition of purchase, and is added in the total. The notice, therefore, claims an amount in excess of legal demands, and is not a compliance with the statute.

"5. The tax notice being void, defendant was a tres-

passer in entering into possession and in retaining possession. At the time of the commencement of this suit, he had no right of possession. Section 142 of the tax law; Pub. Acts 1893, No. 206, as amended by Pub. Acts 1903, No. 83; *Morrison v. Semer*, 164 Mich. 213 (129 N. W. 1).

"6. Plaintiff, by virtue of the quitclaim deed from Sutton, the original owner of record, acquired the original title and the right to redeem the premises from the tax purchase.

"The cases of *Horton v. Helmholtz*, 149 Mich. 227 (112 N. W. 930), and *Horton v. Salling*, 155 Mich. 502 (119 N. W. 912), cited by defendant's counsel, concern tax titles arising from the law of 1897, and are not in point.

"While the sale to the State and the expiration of the period of redemption divested plaintiff's grantor of his title, the sale of the State to defendant reinvested plaintiff's grantor with a title, interest, right, or privilege to redeem which he did not before possess. *Griffin v. Kennedy*, 148 Mich. 583 (112 N. W. 756).

"It seems to have been presumed that this privilege may be transferred by the original owner. *G. F. Sanborn Co. v. Alston*, 153 Mich. 463 (117 N. W. 625); *G. F. Sanborn Co. v. Johnson*, 148 Mich. 408 (111 N. W. 1091); *Chandler v. Clark*, 151 Mich. 183 (115 N. W. 65).

"Whatever the right of the original owner may be, it concerns real estate. I can see no reason why such right should not be transferable, and if it is, a quitclaim deed would be the natural method. Plaintiff's title is sufficient to sustain an action of ejectment against the defendant for possession of the premises.

"Defendant contends that, under the decisions in *White v. Dunsmore*, 167 Mich. 549 (133 N. W. 523), and *Powell v. Pierce*, 168 Mich. 433 (134 N. W. 447), the plaintiff cannot maintain ejectment until he has secured a reconveyance of the land from the purchaser, *i. e.*, until he has obtained a quitclaim deed and release of the defendant's interest. Some of the language in *White v. Dunsmore* might seem to sustain that position, but I do not so construe the decision of the court. It will be noted that the trial court held the plaintiff could not bring suit for trespass until he

had taken advantage of his privilege to redeem by depositing the amount necessary therefor with the register in chancery. In the decision the court says:

"But we are of the opinion that the trial court was right in holding that the former owner could not, before securing a reconveyance of the land, maintain this action."

"This language would indicate that the deposit of the redemption money works a reconveyance. Other language of the decision intimates that the deposit determines the right of the parties, and such, I apprehend, is the intent of the statute.

"Section 141, Pub. Acts 1897, No. 229, amending Pub. Acts 1893, No. 206, is obviously a redemption statute, it provides for redeeming the lands from the tax sale. By deposit of the necessary sum with the register, which is one method pointed out in the statute by which the original owner may redeem, the tax deed and certificates become 'void and of no effect against the lands thus redeemed.' Section 141 of the tax laws; *Miller v. Steele*, 146 Mich. 127 (109 N. W. 37).

"The word 'redeem' means to 'buy back,' to liberate an estate by paying the debt for which it stood as security; to purchase; to receive back by paying the obligation; to regain.' 34 Cyc. p. 766.

"It would appear that, upon redemption in the statutory manner, something more than a mere right to compel a quitclaim and release from the tax purchaser accrues to the original owner. The tax purchaser becomes divested of all his interest in the premises by redemption. Would it be said that his interest remains in abeyance, vesting nowhere, until he has given a deed? Obviously not. It would be 'redeemed,' 'repurchased,' 'bought back,' 'regained,' by the original owner, and his estate would be 'liberated' from the lien against it. Such, as I view it, would be the effect of the deposit of the redemption money with the register, and, as plaintiff deposited such money before the commencement of this suit, it appears to me that he has become reinvested with the whole title and the present right of possession.

"8. The defendant is not entitled to recover for the improvements made upon the premises. His entry

was in violation of the provisions of Public Acts 1903, No. 110, and occupancy for six years would not entitle him to compensation.

"The case of *Powell v. Pierce*, 168 Mich. 432 (134 N. W. 447), is on all fours with the one at bar as concerns this particular question. In that case the defendant's grantor entered in May, 1903, conveyed by warranty to defendant in April, 1906, and claim was made that defendant and her grantor had peaceably occupied the land for six years before suit began, under color of title and in good faith. In December, 1902, an attempt had been made, but ineffectually, to give the statutory notice. The court held that defendant was not entitled to compensation for improvements either under 1 Comp. Laws 1897, § 3927, or 3 Comp. Laws 1897, § 10995.

"Judgment will therefore be entered in favor of the plaintiff and against the defendant in the usual form in ejectment for possession of the premises, together with the plaintiff's costs to be taxed."

The judgment is affirmed.

MCALVAY, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

HAYDEN v. TOWNSHIP OF BANGOR.

MUNICIPAL CORPORATIONS—HIGHWAYS—BRIDGES.

Evidence that decedent drove his vehicle and team around a washed out culvert and across a temporary bridge erected by the township, that in returning to the highway he attempted to drive across an open ditch partly filled with water, that he made no effort to ascertain whether the way was a safe one, and that a vehicle which preceded

him at the same place in plain view encountered difficulty in crossing the ditch, and that the occupants were partly thrown out and partly jumped from the buggy, *held*, to warrant the trial court in directing a verdict for defendant township on the ground of contributory negligence, there being no invitation or direction to cross the ditch at the point selected by decedent.

Error to Van Buren; Des Voignes, J. Submitted June 19, 1914. (Docket No. 81.) Decided October 2, 1914.

Case by Lillie Hayden, as administratrix of the estate of Andrew Hayden, deceased, against the township of Bangor for the unlawful killing of decedent. Judgment for defendant. Plaintiff brings error. Affirmed.

Thomas J. Cavanaugh and Diekema, Kollen & Ten Cate, for appellant.

L. J. Lewis and David Anderson, for appellee.

On August 8, 1912, a very heavy rainfall occurred in Van Buren county. As a result several bridges and culverts were washed out in the township of Bangor. Among them was a culvert on the town line road between Arlington township and Bangor township; the culvert itself lying within the village of Bangor. On the following day, in the afternoon, Mr. Disbrow, the highway commissioner, instructed Mr. Raymond, the marshal of said village, to put down a temporary bridge around said culvert. Mr. Raymond, on the afternoon of the 9th, erected a temporary bridge 20 feet east of the culvert proper. This bridge extended about 4 feet east of the line of the highway onto private property. It was made of telephone poles laid across the creek and covered by planking 16 feet long, with a little filling to the approaches on either end. At the north

side of this temporary bridge there was a roadway leading southeasterly into the lands of Mr. Boyer, and over this people going south entered to cross the temporary bridge. To the south of the bridge there stood a row of maple trees along the roadside, and east of the trees was an open oat field. Between the trees and the traveled portion of the highway there was a ditch which gradually sloped from the bottom up to the traveled part of the highway. It was an old ditch partly caved in and grown up with grass, weeds, briars, etc. After erecting the temporary bridge, Raymond placed a light on a box at the north end, and an 18-foot board across the way, one end resting on the ground, and the other on the second wire of a barbwire fence to the east. South of the temporary bridge no barrier was placed to indicate at what point the traveler going south should leave the private property and seek to regain the highway.

On the morning of the 10th of August, sometime between 6 and 7 o'clock, three teams started south from Bangor and across the temporary bridge in question. They proceeded in the following order: John W. Greenman in front, driving a logging truck; following him, Mr. Marshall and another gentleman in a buggy to which a single horse was hitched; following the buggy was plaintiff's decedent, likewise driving a heavy logging truck. The front wheels of the truck were 48 inches high, and the bolster upon which plaintiff's decedent was riding was $1\frac{1}{2}$ inches higher than the wheel. He was seated in the middle of the bolster. Greenman, who was in advance, safely crossed the temporary bridge and proceeded south about 50 or 60 feet into the oat field, at which point, his horses having come into contact with a loose wire, he stopped his team in order to remove the wire. While he was standing there, Marshall and his companion in the buggy passed him to the right, and at a point

between 60 and 75 feet south of the temporary bridge turned west across the ditch in order to regain the traveled portion of the highway. Marshall was closely followed by plaintiff's decedent with the logging truck.

In crossing the ditch, as the front wheels of the buggy dropped into it, Marshall and his companion were partially thrown, and, in order to save themselves, were compelled to jump from the buggy. As the team of plaintiff's decedent approached the ditch it was going very slowly, and, as one witness testified, "it kind of stopped," when plaintiff's decedent slapped the horses with his line, and they proceeded into the ditch. As the front wheels of the logging truck dropped into the ditch, which was at that point about two feet deep partially filled with water and obscured by a growth of weeds, etc., the plaintiff's decedent was violently pitched forward upon the ground, and the horses, proceeding rather rapidly to get out of the ditch, drew the truck over him, causing injuries from which he died about two days later.

Among other acts of negligence relied upon by the plaintiff, it is said in the amended declaration:

"That it also became the duty of said township to put up and erect barriers or notices or warnings or some means by which the public would be warned of the particular course that should be followed to gain entrance to the traveled part of the highway after crossing said temporary bridge to the south, or so that the public might know at what particular point it would be safe to endeavor to reach said temporary bridge in traveling north on said highway."

The case was submitted to the jury, and, a verdict having been found in favor of defendant, it is now here for review.

BROOKE, J. (*after stating the facts*). At the close of the evidence introduced on behalf of the plaintiff, a motion was made by defendant for a directed verdict

based on many grounds, and, among them, upon the ground that plaintiff's decedent was guilty of contributory negligence as a matter of law. This motion was denied, and the case was submitted to the jury under a charge which is severely criticised by counsel for plaintiff, and upon which many assignments of error are based.

As to just what duty a municipality owes to the public in the maintenance of temporary ways outside the regular traveled portion of the highway, it is not necessary under the facts in this case to determine. We have read the evidence introduced on behalf of the plaintiff with care, and have reached the conclusion that the motion for a directed verdict made by defendant should have been granted upon the ground that plaintiff's decedent was guilty of contributory negligence as a matter of law. We are impelled to this conclusion by a consideration of the following facts. There had been in the vicinity of the scene of the accident an unusually severe rainfall, resulting in the carrying away of many bridges and culverts. The bridge over which plaintiff's decedent passed had been completed on the evening of the 9th. He and his companions passing over it on the morning of the 10th were the first persons to use it. No roadway south of the temporary bridge had been marked out, and one crossing it was notified to go in no particular direction. Plaintiff's decedent was the third to cross the bridge. The one who first crossed it kept to the left in the field and was in a safe place; the second to cross it, Marshall, who was in the buggy, instead of likewise keeping to the left, turned abruptly to the right and attempted to cross the ditch in question and to regain the roadway at once. There was no invitation to cross at that point, and when choosing a new way common prudence would have imposed the duty on Marshall and his companion to satisfy them-

selves of the reasonable safety of the way before using it. This they did not do, and in crossing were partially thrown and partially jumped from the rig in which they were riding. All this occurred in broad daylight immediately in front of plaintiff's decedent. His own team when it approached the ditch in question hesitated, and without the slightest care for his own safety he urged them to cross. At the moment he was perched upon a narrow, slippery bolster, the top of which was faced with iron, only $3\frac{1}{2}$ inches wide, with his feet resting upon the tongue or hounds in front of him. With the ocular demonstration of what had happened immediately preceding his attempt to cross and the fact that Greenman's team stood but a few feet to the left in a place of safety, we think that the plaintiff's decedent's conduct in the premises indicates such a reckless disregard for his own safety as to preclude plaintiff's recovery. Inasmuch as for this reason a verdict should have been directed, it becomes unnecessary to consider any of the assignments of error upon which plaintiff relies.

The judgment is affirmed.

MCALVAY, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

MORSE v. LOWE.

1. WILLS—DESCENT—NEXT OF KIN—RELATIONSHIP.

Under the terms of a devise to testator's son for life and at the son's death to his children, if any, or, if he leave no issue, to his "next of kin by blood relationship," his father's sister, a sister of his mother and a half brother and half sister of the mother were entitled to equal shares of the property upon the decease of the son without issue.

2. SAME—ESTATES OF DECEDENTS.

The statute of descent, 3 Comp. Laws, §§ 9064, 9068 (4 How. Stat. [2d Ed.] §§ 10959, 10963), has no application to lands which are lawfully devised; and the method of determining the relationship is to be based on the rules of the civil law. Next of kin includes half blood as well as whole blood.¹

Appeal from Oakland; Smith, J. Submitted June 22, 1914. (Docket No. 45.) Decided October 2, 1914.

Bill by John E. Morse and others against Deborah Lowe for the construction of a will. From a decree for complainants defendants appeal. Affirmed.

Patterson & Patterson, for complainants.

C. C. Yerkes, for defendant.

BROOKE, J. The bill of complaint in this cause is filed for the purpose of obtaining a construction of one section of the last will and testament of John W. Morse who died March 19, 1903. The clause in question follows:

¹ As to the meaning of "next of kin," see note in 15 L. R. A. 300.

On the right of persons claiming through deceased relative to participate with those standing in equal degree of relationship with such relatives, in provision for "next of kin," etc., see note in 28 L. R. A. (N. S.) 479.

"Second: I give, devise and bequeath to my son, Rollin J. Morse, for and during the term of his natural life the net use and income of the west half of the southeast quarter of section five and the west half of the northeast quarter of section eight, all in township one north of range eight east, Michigan, and at the death of the said Rollin J. Morse, I give, devise and bequeath the same to his children if any, and if my said son Rollin J. Morse shall die leaving no issue him surviving, then and in that case, I give, devise and bequeath the same to his next of kin, by blood relationship."

Rollin J. Morse died without issue in the month of April, 1912. His nearest relatives at the time of his death were the following: (1) Deborah Lowe, defendant (since deceased), a full sister of his father; (2) Susan Rollin Jones, a full sister of Sarah Rollin Morse, his mother; (3) Mary E. Ackley, a half-sister of his mother; (4) John E. Morse, a half-brother of his mother. No one except the four persons above named has or claims to have any interest in the estate, except that, defendant having died since this suit was commenced, her daughters, Katie M. White, Mary Severance, and Myrtle Ford have been substituted as defendants in her place. By the decree of the court below it was determined that the complainants, John E. Morse and Mary E. Ackley, half brother and sister respectively, of the mother of Rollin J. Morse, and Susan Rollin Jones, full sister of the mother of Rollin J. Morse, were each entitled to one-quarter of the estate, and that the three daughters of Deborah Lowe were entitled to the other undivided one-fourth interest in equal shares. From this decree the defendants, being said daughters of Deborah Lowe, appeal.

Chapter 242, 3 Comp. Laws, is entitled, "Of title to real property by descent." Section 1 thereof provides:

"When any person shall die seised of any lands, tenements or hereditaments, or of any right thereto,

or entitled to any interest therein in fee simple, or for the life of another, not having lawfully devised the same, they shall descend, subject to his debts, in the following manner:"

Section 9068 (4 How. Stat. [2d Ed.] § 10963), provides:

"The degrees of kindred shall be computed according to the rules of the civil law; and kindred of the half blood shall inherit equally with those of the whole blood in the same degree, unless the inheritance comes to the intestate by descent, devise, or gift of some one of his ancestors, in which case, all those who are not of the blood of such ancestor shall be excluded from such inheritance."

The contention of appellants is stated as follows:

"It is the contention of the defendants that where the terms of the will provided that the fee of the property in question should go to the next of kin of Rollin J. Morse, by blood relationship, it was intended and contemplated that the statute above referred to was, to all intents and purposes, incorporated as a provision of the will in question for its proper construction and interpretation, and that if it is necessary to take the provisions of this section to which the complainants have resorted for the meaning of the term 'next of kin by blood relationship,' all of the provisions of such section must be so employed. In other words, that the obvious intent of the testator was that the property in question should go to Rollin J. Morse for his lifetime and at his death it should go to his next of kin in precisely the same manner as if Rollin J. Morse had died intestate owning the fee of the property in question."

In support of appellants' contention the following cases are cited: *Lincoln v. Perry*, 149 Mass. 368 (21 N. E. 671, 4 L. R. A. 215); *Bayley v. Beekman*, 197 N. Y. 593 (91 N. E. 1110); *Harris v. Newton*, 46 L. J. Ch. n. s. 268; *Ashton's Estate*, 134 Pa. 390 (19 Atl. 699); *Parrish v. Groomes*, 1 Tenn. Ch. 581. We have

examined all of these cases but do not consider them controlling of the point in issue. It should be borne in mind that the statute above quoted has no application because John W. Morse, the maker of the will in question, did not die seised of any lands, *et cetera*, *not having lawfully devised the same*. The statute of descent clearly has no application to property which has been lawfully devised. Upon the death of Rollin J. Morse the estate in question is devised to his next of kin by blood relationship. This would seem to be a definite and ascertainable class, and the only question for determination is who falls within that class. The term "next of kin" signifies those who stand in the nearest relationship to Rollin J. Morse according to the rules of the civil law for computing degrees of kinship. *Clark v. Mack*, 161 Mich. 545 (126 N. W. 632).

Jarmon in his *Treatise on Wills*, vol. 2 (5th Am. Ed.), p. 643, says:

"A devise or bequest to next of kin creates a joint tenancy in the nearest blood relations in equal degree of the *propositus*; such objects being determined without regard to the statutes of distribution."

In a note to the text it is said:

"It may be added that in the absence of any reference to the statute of distributions, the next of kin and their degree of kinship are to be ascertained by the rules of the civil law" (citing 2 Kent's Com. 233; 2 Redfield on Wills, 77).

And, further:

"Next of kin, unless otherwise expressed, includes half blood as well as whole blood" (citing Wms. Ex'rs [6th American Ed.] 1208; Theobald on Wills, 168; *Cooper v. Denison*, 13 Sim. 290; *Cotton v. Scarancke*, 1 Mad. 35; *Grieves v. Rawley*, 10 Har. 63).

The three complainants and the deceased defendant, Deborah Lowe, stand in the same degree of consanguinity to Rollin J. Morse if the computation is made

according to the civil law, which must be done irrespective of the statute. See authorities cited *supra*. Whether the expression in the will, "by blood relationship," was intended to limit the devise to those next of kin of Rollin J. Morse having the largest amount of blood of Rollin J. Morse in their veins or not, it is impossible to determine, but it would seem that the term was intended rather to describe a class than indicate a distinction between members of that class. As a matter of fact Mary E. Ackley and John E. Morse, two of the complainants, half brother and sister to Rollin Morse's mother, and who would be excluded from this devise by defendant's theory, have more of the blood of Rollin J. Morse in their veins than have either Susan Rollin Jones, his mother's full sister, or Deborah W. Lowe, his father's full sister, for the reason that Mary E. Ackley and John E. Morse are not only son and daughter of his grandmother upon his mother's side, but they are son and daughter of S. K. Morse, who was a full brother of his father. However, as before pointed out, we think this distinction was not intended by the testator.

We are of opinion that the conclusion reached by the learned circuit judge was the correct one, and his decree is therefore affirmed, with costs.

MCALVAY, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

BARR v. PACKARD MOTOR CAR CO.

1. JUDGMENT—EQUITY—INFANTS—FRAUD—APPEAL.

Where complainant filed a bill in equity to set aside a judgment which by consent had been entered in his favor against defendant in justice's court, averring that he had been induced by the fraudulent representations of the physician of an insurance company which protected defendant against injuries occurring to its employees, to compromise his claim for personal injuries for an inadequate amount, and where the trial court, after hearing the proofs, denied the relief prayed for, on the ground that fraud had not been established, the court, on appeal, will not determine the case on the theory that complainant was an infant and had repudiated the compromise before he became of age, unless it can determine from the record that an injustice has been done and that the contract was induced by fraud or unconscionable methods.

2. SAME—EQUITY—SETTING ASIDE JUDGMENT.

The exercise of equitable jurisdiction to set aside a judgment is rarely exercised, and then, only when it is made clearly to appear that an injustice has been done.

Appeal from Wayne; Mandell, J. Submitted June 19, 1914. (Docket No. 60.) Decided October 2, 1914.

Bill by Harry E. Barr against the Packard Motor Car Company for a decree vacating a judgment in justice's court. From a decree for defendant, complainant appeals. Affirmed.

Keena, Lightner, Oxtoby & Oxtoby, for complainant.
Frank W. Atkinson, for defendant.

STEERE, J. This is an appeal from a decree of the Wayne county circuit court, in chancery, dismissing complainant's bill filed to obtain cancellation of a judgment in justice's court rendered in his favor by con-

sent on settlement of a claim for damages resulting from personal injuries while in defendant's employ, and praying that defendant "be estopped from pleading said judgment as a defense to any action brought by your orator against it for damages as aforesaid."

A former order of the circuit court, in chancery, overruling a demurrer to said bill, was sustained on appeal to this court, and the case remanded, with leave to defendant to plead over within the time provided by rule. The decision is reported in 172 Mich. 299 (137 N. W. 697). The nature of complainant's claim and the history of the case up to that time sufficiently appear in that decision and need not be repeated here.

On remand of the case defendant made answer and denial of all charges of misrepresentation, or fraud, and other material allegations embodying grounds for equitable relief set out in complainant's bill, and replication thereto was duly filed. The case was then heard on pleadings and proofs in open court. The court found that no grounds for equitable relief stated in the bill of complaint were sustained by the proof, and rendered a decree dismissing the same for want of equities. The findings and conclusions of the court as to the equities of the case, as disclosed by the evidence, are in part as follows:

"The hearing hereon was had in open court, where all of the witnesses offered by both the complainant and the defendant were heard at length. None of the allegations of fraud and misrepresentations, in my opinion, as alleged in the bill, were established by the proofs. It appears from the proofs that the complainant, at the time of settlement, was between 20 and 21 years of age; that he lived at home with his mother, and the members of her family; that negotiations with the insurance company for a settlement were initiated by him, and that on two or three several occasions, when he visited the office of the insurance company,

he was accompanied by his brother Arthur Elliott Barr, a person of full age; that he visited not only the physicians of the insurance company but saw a physician of his own choosing, who for some little time had been his family physician. All of these physicians, except one, were sworn at the hearing hereof. At the hearing complainant testified that he was told by his own physician that his shoulder was dislocated and two of his ribs were broken in the accident that is the subject of his litigation with the defendant. This testimony is denied by his own physician, who testified the complainant consulted him, and that a most thorough examination of the complainant by him failed to disclose any physical injury whatsoever. The other physicians who testified made the same statement, and all agreed that a most thorough examination failed to disclose any objective symptoms whatever. At the suggestion of the defendant, two of the physicians examined the complainant during the hearing of this cause, and they unite in stating that an examination failed to disclose anything the matter with the complainant, except possibly a nervous condition. Dr. Hitchcock, an expert in nervous disease, who is retained by the insurance company, testified that, at the time of his examination of the complainant, the complainant was or pretended to be suffering from certain nervous ailments, but the physicians thought they were due more to imagination and hopes of the outcome of litigation than as any result of the accident complained of. It appeared from the testimony that Arthur Elliott, who appeared at the trial of the case in the justice's court, and who negotiated for him and on his behalf with the insurance company, was in fact Arthur Elliott Barr, complainant's own brother, and a member of his household. It appears further that the money received by the complainant in settlement of his claim was turned over to and accepted by his mother and expended principally in housekeeping expenses; only an insignificant part of this amount was shown by the complainant to have been expended for doctor's services and for medicine. * * * I am of the opinion that this judgment should not be set aside, unless it is shown that it was fraudulently obtained. As there is no proof in the case that

the judgment was fraudulently obtained, and further as it does appear to the court that the amount of the judgment was adequate, and further that it went to his mother, the actual guardian of the complainant, and further that his interests at the hearing and before the trial in the justice's court were fully and fairly represented by his adult brother, Arthur Elliott Barr, I feel it would be inequitable to disturb that judgment and harass the defendant by further litigation."

A careful reading of the pleadings and testimony satisfies us that the record fully sustains these findings and conclusions of the trial court; that complainant's charges of fraud, misrepresentation, and undue advantage are not borne out by the evidence.

It is contended in complainant's behalf that he is entitled, apparently irrespective of all other considerations, to have the judgment of record in the justice's court set aside, "because he was an infant at the time the settlement was made, and because he had repudiated it when he came of age." If so, the questions of fraud, liability of defendant, and adequacy or inadequacy of the amount paid in settlement were immaterial and not properly before the court. Such is not the scheme of his bill. In sustaining said bill on demurrer, this court recognized as the basic, equitable ground for relief the allegations of fraud, misrepresentation, and inadequacy which are now apparently claimed to be unimportant and not properly before the court for consideration. In connection with, and as bearing upon, them, complainant's minority was a factor; but his strictly legal right on coming of age to repudiate without restoration a contract made during minority is not the controlling question in this equity suit. He has appealed on equitable grounds to the chancery court for relief against an alleged unconscionable wrong, and has failed to sustain those grounds which he urged in his pleadings and which he sought to prove. Those questions were germane to

the issue and furnished the moving equities of the bill. When this court said, "His bill of complaint presents a case entitling him to relief in equity," it was dealing with the bill taken as a whole and taken as true, not with a bill merely stating an alleged purely legal right, which might, under the particular circumstances of a special case, be inequitable.

A contract by a minor is not void but voidable. Such contracts are to be enforced or repudiated in a court of equity upon equitable grounds. *Gates v. Cornett*, 72 Mich. 420 (40 N. W. 740).

In *Cadillac Automobile Co. v. Boynton*, 240 Ill. 171 (88 N. E. 564), it is said:

"The question whether or not appellant was indebted to the plaintiff in the judgment was equally important, for it is a well-settled rule of law that equity will not enjoin the collection of a judgment, even though rendered without service of process, unless a meritorious defense is shown"

—citing *Reed v. Exchange Bank*, 230 Ill. 50 (82 N. E. 341), in which it is said a mere general allegation of a good defense is not a sufficient pleading in such a case, but the facts upon which the party relies must be set out.

"A judgment at law may be vacated by a court of equity in a proper case, but the exercise of such jurisdiction is rare. It is only exercised after it has been made to appear clearly that an injustice has been done." *Finn v. Adams*, 138 Mich. 258 (101 N. W. 533, 4 Am. & Eng. Ann. Cas. 1186).

We agree with the learned chancellor in this case that it has not been made to appear clearly that an injustice has been done complainant.

The decree is affirmed, with costs.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

LETOURNEAU v. ERICKSON.

1. EMINENT DOMAIN—HIGHWAYS AND STREETS—BOUNDARIES—INCONSISTENT VERDICT.

Where the highway commissioner filed a petition to condemn a public highway along the boundary line between two sections of land two rods on either side of the said line which formed the boundary between respondent and his neighbors, and where, at the trial, a contest arose as to the true position of the quarter post and of the section boundary, upon the testimony showing surveys made by different parties, and the jury found that the survey as made or claimed by one surveyor was correct but awarded damages on the basis of another survey, for $4\frac{1}{2}$ acres of land, although the parcel as set forth in the petition was two rods wide on the east side of the section line, and 160 rods long, containing only two acres, the verdict was inconsistent and must be reversed on error.

2. HIGHWAYS—COMMISSIONER OF HIGHWAYS—PETITION.

The jury in eminent domain proceedings, on appeal from a verdict and award for taking appellant's property for a highway, has authority under the statute (Act No. 283, Pub. Acts 1909; 1 How. Stat. [2d Ed.] '§ 2173 *et seq.*), to determine disputed boundaries involved in the taking of a part of the lands, where a controversy arises out of a disagreement as to the location of the section line by the surveyors.

3. SAME—SECTION LINE, LOCATION.

Where the question of locating the correct section line at one end was in dispute, and was properly raised in the court below, appellant was entitled to have the issue tried by the jury, and settled, before steps were taken to open and improve the highway.

Error to Bay; Collins, J. Submitted June 22, 1914.
(Docket No. 113.) Decided October 2, 1914.

Eminent domain proceedings by Carl Erickson, highway commissioner of the township of Greenfield, Bay county, against Nelson Letourneau and others for the taking of private property for a public highway. From a determination of the commissioner lay-

ing out the highway and assessing damages, the respondent named appealed to the township board and later to the circuit court. Judgment establishing the highway; respondent brings error. Reversed.

Charles W. Hitchcock, for appellant.

Kinnane & Lane, for appellee.

STEERE, J. This case involves proceedings taken under Act No. 283, Public Acts of 1909 (1 How. Stat. [2d Ed.] § 2173 *et seq.*), to lay out a highway in the township of Garfield, Bay county, Mich., under an application. dated February 11, 1912, signed by a proper number of qualified freeholders, describing the proposed highway applied for as follows:

"Commencing at the northwest corner of section 1 of said township of Garfield, being town 16 north, range 3 east, and running thence south along the section line between sections 1 and 2 of said township to where it intersects the east and west quarter line of sections 1 and 2 of said township."

This called for a highway one-half mile in length running north and south between the north halves of the two sections mentioned. Upon this application the township highway commissioner proceeded to lay out such highway according to the provisions of said statute. Appellant, an adjacent landowner, being dissatisfied with the commissioner's determination, appealed to the township board, where the action of the commissioner was affirmed, with a modification increasing appellant's awarded damages, whereupon he appealed to the circuit court of Bay county. On trial of the matter in said court by jury a verdict was rendered affirming the decisions of the commissioner and township board in laying out said road, but again increasing his award of damages, the material part of said verdict as recorded being that said jury—

"Say upon their oath that the highway as laid out and established by the highway commissioner of Gar-

field township through the lands of appellant is necessary and they appraise and assess the damages of said appellant for the land taken for such highway and the moving of his house, fence, and buildings therefrom at the sum of \$335."

A motion for a new trial was denied.

None of the testimony is included in the record, which contains the pleadings, recorded proceedings, charge of the court, minutes of the stenographer at the time of taking the verdict, and certain exhibits. Appellant's assignments of error relate to the charge of the court and denial of motion for a new trial. The facts in the case must necessarily be gathered from the pleadings, exhibits, charge of the court, reasons for denying the motion for a new trial, and undisputed statements in the briefs of counsel.

Appellant was represented by counsel at the time of appealing to the township board from the action of the highway commissioner, and filed written reasons for his appeal which, condensed, are: That the commissioner had no jurisdiction to make any determination in the matter, and all his proceedings are illegal and void; that he attempted to settle boundaries without authority; that he made no legal tender of damages to appellant; that the survey of the proposed highway as made by the county surveyor and attached to the return of said commissioner is not in accordance with law; that the route of the proposed highway is not on the section line between sections 1 and 2 in said township; that said route is a confiscation of appellant's property without due remuneration therefor, his damages being more than \$500, and that said highway could be laid out without cost to the township for right of way "by deflecting the route of said road a short distance to the east at the extreme south part of appellant's land, to the point or place where appellant claims the section line really is, and where the

government stake shows it to be." To what extent these various reasons were urged before the court upon the trial can only be inferred from the present contentions of counsel, the charge of the court, and reasons given by the court in denying the motion for a new trial. This record contains the minutes of only one survey of the highway made by Calvin Thornthwaite, county surveyor, under the statute at the instance of the highway commissioner, as follows:

"Commencing at the post in the north boundary of township sixteen north, range three east, between sections one and two, thence south one degree west 19.35 chains to the $\frac{1}{8}$ post, thence continuing on same course, 20.25 chains to the $\frac{1}{4}$ post between sections one and two and end. Said highway to be four rods in width and the right of way to be two rods in width on each side of said line.

"Dated this fourth day of March, A. D. 1912.

"CALVIN G. THORNTHWAITTE,

"County Surveyor, Bay County, Michigan."

It appears from the charge of the court and undisputed statements of counsel that there was a contention over where this line really was, on the land, other surveys having been made by surveyors named Bass, Johnson, Kelly, Turner, and Schindehette, all, as we infer, corresponding with that of Thornthwaite except Kelly's. The line as laid out by the highway commissioner was spoken of as the "Johnson-Turner-Thornthwaite Survey." The Kelly survey bore more to the east than the other, as it ran south, and ended farther south. Maps of both surveys appear to have been in evidence before the jury, though not in the record before us. Both surveys ran from the same starting point, being the agreed corner post at the north end of the section line between sections 1 and 2, running thence south to the claimed quarter post between said sections, which they did not locate at the same spot.

It is said in the brief of counsel for appellant that the Kelly quarter post is "at a point approximately 91 feet east and 53 feet south of the post or point which the township claims to be the terminus of the road." In charging the jury the court recognized this as an important issue of fact, and in submitting it devoted approximately seven of the ten printed pages of the charge to that subject, saying, among other things:

"Now, the same questions are before you that were before the highway commissioner and were before the township board, and these questions are these: *First*, was it necessary for the establishment of that highway on the line where it was laid out, and that question is a question of fact for you to decide. *Second*, if you find that there is a necessity for a highway, then you must determine the question—the disputed question—as to the line and determine the amount of damages. * * *

"Now, gentlemen of the jury, it appears right in the start of this case that there is a conflict between the opposing parties, that is, between Mr. Letourneau, the appellant in this case, and the highway commissioner, Mr. Erickson, representing the township in this case; that is, that there is a conflict as to the location of the section line between sections 1 and 2 and the east and west quarter line running through sections 1 and 2, and there have been described to you surveys made by Mr. Bass, Mr. Johnson, Mr. Kelly, Mr. Turner, and Mr. Schindehette. These various surveys and the lines that they have laid out and the work that they have done have been laid in evidence before you, and I will give you the law governing the surveys, and these matters will have to be considered by you. * * *

"But that does not meet the question altogether, because it is the claim of the township, or of Mr. Erickson representing the township, that Mr. Letourneau is entitled to but two rods, the two rods immediately west of the Johnson and Thornthwaite line. It is the claim of Mr. Letourneau that that does not give him all the land that he is entitled to because he is entitled to claim, as he says, as far east as the line

laid out by Mr. Kelly, so that the controversy as to the amount of land depends upon these various lines. If the Johnson-Turner-Thornthwaite survey is correct, then it is two rods east and west and the length of the 80. If the Kelly line governs, or the Kelly survey, then the true line is farther to the east on the east side, and farther to the south on the south side, or, in other words, Mr. Letourneau claims that he is entitled to land to the east of this line and to the south of the line. * * *

"Now, gentlemen, I want to fix this point in your minds in considering these different surveys. In the first place, the government laid out that land, surveyed it and subdivided it, and the question is all referred back to the original work of the government. There is no such thing as changing a corner in law or changing a line. The law does not recognize but one corner and one line. There is only one correct line according to the government survey, and only one correct corner according to the government survey, and the thing to do and the question to get at is what the line or lines actually were as laid out by the government.

* * * * *

"The question of Mr. Kelly's survey, and his placing of the post that he claims at the quarter post between sections 1 and 2 comes before the jury in this case as a question of fact, and it is for you to determine from all of the evidence in the case whether or not the so-called Kelly quarter post was correctly or erroneously located.

* * * * *

"As to which of these surveys is correct, the Kelly survey or the Johnson-Turner-Thornthwaite survey, is a question of fact for you to decide from all the evidence that has been put before you under the instructions of the court.

* * * * *

"Now, gentlemen, as I have said before, the first question for you to take up is the question of necessity. If you find that the road is not necessary, that will end the case. If you find that it is necessary, then I advise you to take up the question as to which of these surveys is correct, and in that way settle the amount of land which will be taken for this highway. After

you have settled the amount of land, if you come to that point, then I advise you to take up and consider the question of damages which Mr. Letourneau shall be allowed on account of the establishment of the road."

Much more was said to the jury as to their duties in determining the true line.

When the jury returned into court to render their verdict the foreman said, in response to the usual question:

"We have agreed that the road is a necessity; we also agreed that the Kelly stake is the proper stake, and we also find that it is necessary to take $4\frac{1}{2}$ acres of land at \$30 per acre, \$135, the moving of the house at \$125, the outbuildings, \$40, and the fence, \$35, a total of \$335."

Whereupon the following took place:

"*The Court*: That seems to be full and clear.

"*Counsel for Appellant*: All I can say, the verdict of the jury finding the Kelly stake to be correct is probably—

"*Counsel for Appellee*: That is not a question submitted to the jury.

"*The Court*: That does not make any difference.

"*Counsel for Appellee*: They passed upon two questions, one is that the road is a necessity, and the damages or compensation, \$335. * * *

"*Counsel for Appellant*: Let me have this on record. The jury finding that the Kelly stake is correct, it would seem to me that the Thornthwaite stake is not correct, and that the road is not on the proper route.

"*The Court*: Well, that is not a question you can raise now.

"*Counsel for Appellant*: I want the record, is all.

"*The Court*: Gentlemen of the jury, you have heard the verdict as announced by your foreman. Is that your verdict?

"*The Jury*: Yes.

"*The Court*: So say you all, gentlemen of the jury?

"*The Jury*: Yes, sir.

"The Court: The material parts are first, that the road was a necessity, and you all agree to that?

"The Jury: Yes, sir.

"The Court: Second, that the total amount of Mr. Letourneau's damages is \$335. You all agree to that?

"The Jury: Yes.

"Counsel for Appellant: Thirdly, that the Kelly stake is correct.

"The Court: I have not said anything about that.

* * *

"Counsel for Appellant: I would like to have—

"The Court: That is already in the case, and once in it is enough."

The court then discharged the jury.

Before the verdict was formally entered counsel on each side prepared proposed forms for journal entry which they desired adopted by the court; that of appellee being substantially the one already quoted from in part; that of counsel for appellant particularly including the statement "that the Kelly stake is the proper stake."

We think this record shows conclusively that three questions of fact were submitted to the jury, the necessity, the true line, and the damages. The jury answered all three. The court appears to have regarded the second, to which most of the charge was devoted, as not of controlling importance, material only in connection with the measure of damages, and entered a verdict and judgment on the other two.

In denying the motion for a new trial the court said in part:

"The identity and the place of the piece of land 4 rods wide by 80 (160) rods long to be appropriated there is no reasonable question about. The actual controversy in this case was the question of necessity, and as to how much of this piece of land 4 rods wide by 80 (160) rods long belonged to Mr. Letourneau."

We must assume this means the identity and place

indicated by the plat and minutes of survey made by Thornthwaite, the county surveyor, and made a part of the return by the commissioner on laying out the highway, for if the identity and place indicated by the Kelly survey was taken into consideration, there was a question between two places, in relation to which the measure of damages varied materially.

But upon any theory which the record before us will support we are unable to conceive how a straight highway four rods wide and one-half mile long laid out upon and extending two rods wide on each side of a section line, which is the east boundary of appellant's 80 acres of land, can take from him more than 2 acres, wherever the true line might be. The documentary evidence, charge of the court, and statements of counsel seem to show without question that appellant owned the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 2, and two men, named Johnson and Monsion, who deeded to the township the right of way on their side of the line, for \$1 each, owned the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 1, and that the proposed highway four rods in width was to be laid out along the north half of the section line running between said two sections, the right of way to be two rods in width on each side of said line. When the jury determined that the Kelly line was the true section line, but assessed damages for a highway laid out on the other line and not on the true section line, finding it necessary to take $4\frac{1}{2}$ acres of appellant's land for said highway, they rendered an inconsistent verdict, unwarranted by either the facts or law of the case. Eliminating all question or consideration of the Kelly survey from the case and recognizing the highways as correctly located by the Thornthwaite survey, the verdict appropriates $2\frac{1}{2}$ acres of appellant's land for highway purposes in excess of the quantity authorized.

Aside from the validity of the statutory steps taken by the commissioner to lay out a highway, which as a rule involves only questions of law for the court, to be determined from the records and undisputed facts, the usual and paramount issues for the trial are public necessity for the highway and the damages which should be awarded to those whose property is taken. It becomes evident at once, as was graphically illustrated in this case, that before a jury can understandingly determine and justly award damages, they must know what land is included within the right of way and necessary to be taken. In one case the road might so invade the adjacent owner's curtilage, taking fences, orchards, buildings, and other valuable improvements, as to result in heavy damage, while in another case, though but a short distance away, it might take only unimproved or unoccupied land and the damage be comparatively slight.

Either the jury should have been positively instructed that the established highway took the piece or strip of land as marked and laid out according to the survey made a part of the return of the commissioner, which survey could not be questioned and must alone be considered in awarding damages, or that, the location being in dispute, the jury must first determine from the conflicting evidence the true line and location of the road, and then assess damages with reference to the land so taken. In the latter case, after the jury determined the identity of the land within the right of way and assessed appellant's damages with reference to it, that strip of land in law and in fact became the location where the road must run; therefore the finding of the jury on that question became a material part of the verdict. A jury could not determine the true location of the road to be in one place for one purpose and the commissioner or court determine it to be in another place for another purpose.

These proceedings are purely statutory. The provisions for appeal might seem to suggest in the first instance, as held by the trial court, that only the two questions of necessity and damages were open for consideration on appeal.

Section 8 of said Act No. 283 authorizes an appeal from decisions of the township board. The pertinent parts of that lengthy section, amongst other things, provide:

“Any party or parties dissatisfied with the determination of such township board, either as to the value of the property taken or as to the determination upon the necessity for laying out, altering or discontinuing a highway, when the amount involved or damages claimed exceeds the sum of three hundred dollars, may appeal therefrom to the circuit court for the county in which said land is situated, and a return may be compelled and the same proceedings shall be had thereupon, as near as may be, and with a like effect as in cases of appeal from judgments rendered before justices of the peace, * * * and the said circuit court shall also have full power and jurisdiction over said proceedings to hear and determine the same and render judgment therein, as if the said proceedings had been originally commenced before the said circuit court. And either party to said proceedings on said appeal shall be entitled to have the issue in such proceedings tried by a jury, as in ordinary suits in said court.”

It is to be borne in mind that this road was intended to be and purports to be laid out one-half mile in length on a section line running south from the north section corner post between sections 1 and 2 to the quarter post, an authentic, official government survey which had once been made and marked, and of which public record existed. The petition, return of the commissioner, and all the surveys are directed to and in harmony with that proposition. The record contains no suggestion to the contrary. The highway commis-

sioner had authority to lay out a highway on this line without a petition or application from any one. Section 1 of said act, subdivision 4. The purpose of the survey was not to run a new line for a highway, but to relocate on the ground the old government survey. The location of one end of the old line was in dispute, and that question was timely raised by appellant. All the surveys in evidence were directed to the same end and claimed to have done exactly the same thing, retraced the old section line from the section corner post, which was not in dispute, to the quarter post half a mile south, which was in dispute. This raised an issue of fact in the proceeding, which appellant was entitled to have tried by jury and settled before steps were taken to open and improve the highway. We think by fair construction the statute authorized this, and that such construction is in avoidance of multiplicity of suits and protraction of litigation, for otherwise the aggrieved party must be relegated to a subsequent action of trespass or in ejectment or a suit for an injunction in order to determine the question.

In *Hartz v. Brown*, 165 Mich. 660 (131 N. W. 75), it is said this statute furnishes a complete and adequate remedy by appeal to the circuit court. It would be inadequate and incomplete if the question of where the true line was, when an issue of fact, could not be finally determined between the contesting parties, on an appeal to be tried "as if the said proceeding had been originally commenced before the said circuit court."

For the reasons stated, the case is reversed and a new trial granted.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

CUNNINGHAM v. IRWIN.

1. ACCORD AND SATISFACTION—PAYMENT—COMPROMISE.

The rule of law is generally recognized as well settled by the great weight of authority that payment of less than the full amount of a past-due, liquidated, and undisputed debt, although accepted and receipted for as in full satisfaction, is only to be treated as a payment *pro tanto*, and does not estop the creditor from suing and recovering the balance.¹

2. SAME—EXCEPTIONS.

The following exceptions to this general rule are recognized: when the claim is unadjusted or unliquidated; when payment is made before it is due; when a new security is given; when there is a composition with creditors and where part payment in full settlement is made by a third party who is a stranger to the claim and under no legal obligations in relation to it.²

3. PRINCIPAL AND AGENT—CONTRACTS—PAYMENT.

The question whether an agency exists is a mixed question of law and fact.

4. SAME.

A gratuitous payment, though made upon request, by a father, of his son's debts, to which he is a stranger and for which he is not legally responsible, does not necessarily involve an agency in law: one may act in the interest of another, with or without his knowledge, without becoming technically his agent.

5. ACCORD AND SATISFACTION — COMPROMISE — PRINCIPAL AND AGENT.

Where defendant's father gratuitously undertook to pay his obligation that was due to plaintiff, paying in full satisfaction and settlement of the debt a less sum, without any consideration or promise of the son to pay back the

¹On the question of accord and satisfaction by part payment of liquidated and undisputed demands, see note in 45 L. R. A. (N. S.) 1063.

²As to the effect of payment of debt by a volunteer or stranger to the original undertaking, see note in 23 L. R. A. 120.

amount advanced for this purpose, which was withdrawn from the private funds of the parent, and where the son did not bring about this arrangement, and where plaintiff intended to and did deal with the father as principal, looking to him and receiving the funds in settlement, it was a valid accord and satisfaction for a series of notes which defendant had executed to plaintiff in adjustment of a balance due on an open account.

Error to Macomb; Tucker, J. Submitted June 8, 1914. (Docket No. 37.) Decided October 2, 1914.

Assumpsit in justice's court by John A. Cunningham against Alphonso J. Irwin upon five promissory notes. From a judgment for plaintiff, defendant appealed to the circuit court. Judgment for plaintiff. Defendant brings error. Reversed.

Silas B. Spier (*William F. Sawn*, of counsel), for appellant.

William S. Jenney, for appellee.

STEERE, J. This case involves the question of an alleged discharge of debt by way of accord and satisfaction through payment by or through a third party of less than the demand, which was accepted and received for by the creditor as a settlement in full.

The action was commenced August 13, 1912, in a justice's court of Macomb county to enforce payment by defendant of five promissory notes of \$50 each, given by him to plaintiff, on June 19, 1908, at Jacksonville, Fla., where they both then resided. Plaintiff was in the furniture business, and defendant, who at that time was running a restaurant and hotel there, had dealt with him, buying furniture, rugs, etc. These notes are the last of a series, aggregating \$943.30, given in adjustment of, and to cover, a balance then owing on his account. They are serially numbered, and due a month apart, the last one falling due 18

months after date. The earlier notes of the series were paid. Defendant subsequently removed to Mt. Clemens where he resided when this suit was begun.

On the return day of the summons, August 22, 1912, plaintiff declared orally on the common counts and specially on the five notes. Defendant orally pleaded the general issue and statute of limitations. The cause was then adjourned until September 10th, when trial was had. At that time, by permission of the court, defendant withdrew his former plea, and by a plea *pais darrein continuance* claimed settlement and satisfaction of plaintiff's demand, producing and offering in evidence receipts in full therefor given defendant's father. Objections to this evidence were sustained by the justice, and judgment rendered upon the notes and interest in the sum of \$300, the limit of jurisdiction of that court. From this judgment defendant appealed to the circuit court, where the case was tried without a jury.

It appears undisputed from the evidence and findings of the court that defendant's father, R. L. Irwin, who resided at Jacksonville, Fla., was an old acquaintance of plaintiff, and in an interview with the latter in his store an agreement was entered into between the two, on August 27, 1912, by which R. L. Irwin paid plaintiff \$125 in full of all demands against his son, including these five notes, plaintiff agreeing to write his Mt. Clemens attorney to deliver up the notes upon which suit had been brought, at that time giving R. L. Irwin the following receipt:

"JACKSONVILLE, FLORIDA, Aug. 27, 1912.

"Received of Mr. Raymond L. Irwin, address St. Augustine, Florida, one hundred and twenty-five dollars (\$125) on account, subject to agreement, account Alphonso J. Irwin in full.

"No. 13528.

JOHN A. CUNNINGHAM,

"By D. C. CORUS."

Subsequently, but bearing the same date, apparently to make more clear the "agreement" of the first receipt, plaintiff gave him the following receipt:

"JACKSONVILLE, FLORIDA, August 27, 1912.

"Received of Raymond L. Irwin for account of Alphonso J. Irwin, one hundred and twenty-five (\$125.00) dollars in full of all demands, including five (5) notes forwarded to our attorney, William S. Jenney, Mt. Clemens, Michigan, for collection.

[Signed] "JOHN A. CUNNINGHAM."

On September 12, 1912, plaintiff gave the following letter, addressed to his Mt. Clemens attorney, to R. L. Irwin, who at once forwarded it to defendant at Mt. Clemens:

"JACKSONVILLE, FLA., September 9, 1912.

"MR. WM. S. JENNEY,

"Attorney at Law,

"Mt. Clemens, Mich.

"Dear Sir:

"This will confirm our letter to you of August 27th. Kindly surrender the five notes, which you were handling for collection, to Mr. Irwin, as we have accepted his check at this end of the line in settlement of the matter.

"Yours respectfully,

"JOHN A. CUNNINGHAM,

"D. C. CORUS, Manager."

Plaintiff's attorney refused to recognize this settlement, and proceeded with the suit as stated, treating the \$125 as payment on account. His reasons and position in the matter are embodied in the following motion to strike out evidence of such settlement:

"There is no question about it in this State that a compromise where a man pays you \$125 in settlement of a \$300 claim and receives from the creditor a promise to accept that in full settlement is absolutely void, and it does not bar recovery unless there is some consideration other than the \$125, and no consideration other than that has been shown, and I think that re-

ceipt should be stricken out until such time as such consideration is shown."

Against this defendant's counsel contended that the demand was in dispute, and not liquidated; that the money was paid in settlement of a suit then at issue involving a legal controversy, and by a third party who was a stranger to the indebtedness, under no legal obligation in that connection.

The rule of law is generally recognized as well settled by the great weight of authority that a payment of less than the full amount of a past-due, liquidated, and undisputed debt, although accepted and receipted for as in full satisfaction, is only to be treated as a payment *pro tanto*, and does not estop the creditor from suing for and recovering the balance. This is ancient bench law, supported by no statutory authority or rule of property, and, though often criticised as unreasonable, unfair, and unjust, it is said its long and general acceptance commends itself to the courts with almost irresistible force. This aspect of the rule is commented on in *Tanner v. Merrill*, 108 Mich. 58 (65 N. W. 664, 31 L. R. A. 171, 62 Am. St. Rep. 687), which, however, recognizes the rule, and in 1 R. C. L., p. 185, with many authorities cited, where it is said:

"And as it is rigid and unreasonable and defeats the express intention of the parties, it should not be extended to embrace cases not within the very letter of it."

The reason upon which the rule is now held to be founded is that such agreement is without consideration, which appears to be equally satisfying as that of Lord Coke, who, in an early day, pronounced it a proper rule "because it appears to the judges that by no possibility a lesser sum can be a satisfaction for a greater sum." In a number of States the rule has been abrogated by statute, and in a few repudiated by the courts. Of the latter are *Clayton v. Clark*,

74 Miss. 499 (21 South. 565, 22 South. 189, 37 L. R. A. 771, 60 Am. St. Rep. 521), and *Frye v. Hubbell*, 74 N. H. 358 (68 Atl. 325, 17 L. R. A. [N. S.] 1197), where the subject is entertainingly reviewed.

The rule is, however, recognized in this State in line with the weight of authority which now recognizes numerous exceptions, amongst which are: When the claim is unadjusted or unliquidated; when payment is made before it is due; when a new security is given; when there is a composition with creditors; and where part payment in full settlement is made by a third party who is a stranger to the claim and under no legal obligations in relation to it. While this court, in accepting the general rule, has had little occasion to deal with these exceptions, they are well settled by almost universal weight of authority.

Defendant claimed and introduced testimony, against objection, to show that, although notes were given in adjustment of his account, the goods purchased from plaintiff had not all then been delivered, and some of them proved not to be as represented, that he had claimed a rebate, and that he notified the plaintiff, who promised to make it right, or make a reduction on the last payment. This claim was very flatly disputed and met by testimony which we think fully sustained the finding of the court that the claim was liquidated, and—

“That the notes in question in this suit were given in settlement for whatever account the defendant then owed the plaintiff, and the defendant cannot now be heard to say that this controversy was still open and subject to further compromise on the 27th day of August, 1912.”

Plaintiff makes no denial or explanation of the settlement with R. L. Irwin, nor the written evidence of it, nor the circumstances as related by the latter, although plaintiff's testimony was taken by deposi-

tion, with his counsel present, after the settlement was pleaded. He ignores the subject in his testimony, which is devoted to the nature of the consideration for the notes, the circumstances of giving them, denial that any question of rebate was left open, and, in general, to sustaining them as a valid, liquidated demand. The only evidence of his repudiating the settlement is the continuance of the litigation.

The trial court was of the opinion the fact that a suit was pending which would be stopped by the settlement would not be a new consideration which rendered the compromise valid, and, amongst other things, said:

"It is contended by the plaintiff that the settlement made by Raymond L. Irwin in Florida was really a settlement by the defendant through him. On the other hand, it is the claim of the defendant that the settlement by Raymond L. Irwin was made on his own account, although with the knowledge and consent of the defendant. * * * This question of whether the payment made by R. L. Irwin by check on R. L. Irwin's own private account, although the payment was directed by and made for A. J. Irwin, amounted to a valid discharge of the entire debt is really the only question in the case."

Based upon the assumption or finding that the payment was directed by and made for A. J. Irwin, and consequently to be construed as if he had himself made the same in settlement of his notes, the court found, as a conclusion of law, that the case was governed by, and could not be distinguished from, *Bliss v. Shwartz*, 65 N. Y. 444, in which it was held, under the circumstances of that case, that where an agent of the debtor negotiated a settlement with the creditor for less than the full amount of the debt, and closed the transaction by giving his own draft in lieu of the money, which was accepted and receipt given in full settlement of the debt, the acceptance of the draft in-

stead of cash did not amount to a new consideration, and recovery could be had for the balance of the original indebtedness.

Agency is a mixed question of law and fact, and to ascertain if this conclusion of law is supported by any legal evidence resort must be had to the testimony. The only testimony bearing on this claim of agency is that of the defense, and is undisputed. Defendant himself testified that the first notice he had that the notes were sent to an attorney for collection was when he was served with a summons by the sheriff, which he took to an attorney, and he afterwards wrote his father, with whom he regularly corresponded, mentioning this and telling him the situation. Plaintiff's counsel relied upon, and the court accepted as conclusive proof of agency, an affidavit of R. L. Irwin filed in the case, over the admission of which there was a controversy we do not deem it important to consider here, in which he briefly relates the circumstances of the settlement made by him with plaintiff, saying, in part, that:

"The said sum of \$125 paid by him * * * was in full settlement and satisfaction of said notes of A. J. Irwin, and was paid at the request of said A. J. Irwin, for him, the said A. J. Irwin."

Relying upon and quoting this language as sufficient proof of agency, the court found:

"If this is true, the matter is to be considered as if A. J. Irwin had himself paid the \$125 in settlement of the notes in question."

R. L. Irwin does not say the \$125 was paid with his son's money, or even on any promise of the son ever to pay it, or on any agreement with the son to pay it for him, but, on the contrary, testifies positively that he independently made the settlement with plaintiff, paying the amount agreed upon with his own

money drawn from his private account, without any arrangement or agreement with his son to reimburse or remunerate him for any expense and service in making the settlement. He states: That he was an old acquaintance of plaintiff, who, at about the time of sending the notes to an attorney for collection, told him of it, and witness said in reply:

"I don't think it requires a suit against the boy, and let me know what the amount (account) can be settled for, and perhaps you and I can settle, and he went into his office and saw his manager and said he would settle and for me to make an offer."

That thereupon they went over the matter, negotiated and settled as stated, plaintiff stating amongst other things: When a settlement was reached and the \$125 paid, that A. J. "Irwin's account was closed in full."

A gratuitous payment, though on request, by a father of his son's debts, to which he is a stranger and for which he is not legally responsible, does not necessarily involve an agency in law. It is elementary that one may act in the interest of another, with or without his knowledge, without becoming technically his agent. An agency in legal concept is a legal contract, and, to be binding, must possess all the legal elements of a contract, amongst which is a valid consideration. Plaintiff is now seeking to defeat this very settlement because it was void for want of a consideration, and by claiming a contract of agency in which he fails to show consideration, and which the testimony shows was without promise of reward or even reimbursement.

Conceding any elements of agency shown, they were gratuitous and undisclosed. Plaintiff manifestly intended to, and did, deal with the father as a principal, looking to him for and receiving from him the money paid in settlement.

In the foregoing and other particulars the case of *Bliss v. Shwartz*, *supra*, is distinguishable. In that case the settlement was effected by and through George Butler & Co., firm of collecting agents, professionally acting as such, their agency for the debtor being a pure business matter, known and understood by all parties. A question of composition with the defendant's creditors was involved, and they were active in his behalf in that respect. Plaintiff refused to accept the general proposition of settlement offered to creditors. Negotiations were had in which a settlement was reached between the parties for a payment by defendant of a certain sum "in cash." "To carry out this settlement," Mr. Butler gave his draft to the agents of plaintiff, for and with his firm acting as agent of defendant in perfecting the transaction. The court held this was no new consideration from a third party, but simply a "means of payment," and said:

"A very different question would have been presented if the agreement had been to take the draft of Mr. Butler in lieu of the plaintiff's claim. * * * There was no bargain that Mr. Butler's money should be used, or that his draft should be taken. That was but an incidental matter connected with the principal act, which was the payment of cash by the defendant."

In this case it is undisputed that the bargain was that R. L. Irwin's money should be used, or his check taken in lieu of plaintiff's claim, which was the principal act, with no suggestion between the contracting parties that defendant was to pay anything.

In this case the evidence is undisputed that when the settlement was consummated R. L. Irwin (irrespective of at whose request or whether he was reimbursed later) made his own bargain with, and paid his own money to, plaintiff, which is the gist of the third party exception to the general rule. The agree-

ment contemplated furnishing the money by a third party, and it was so furnished; the money paid never belonged to the debtor and a new consideration moved from said third party for plaintiff's benefit. When this is true the questions of agency and request are not necessarily controlling. In 2 Chitty on Contracts (11th Am. Ed.), p. 1133, it is said:

"But the correct doctrine would appear to be that satisfaction made by a stranger to a party having a cause of action, and adopted by the party liable to the action, is a good bar to an action for such cause. And so it would seem that, if the defendant and the party from whom the satisfaction proceeded, stood in the relation of principal and agent, such satisfaction would be a good bar for the defendant."

In volume 1 of Ruling Case Law, a work assuming to winnow by a process of judicial and editorial selection the essence and drift of leading decisions, the law upon this question is thus stated, on page 193, § 28:

"The view that such a part payment may so operate is another well-settled exception to the general rule as regards part payments of liquidated demands, and it is settled that if part payment is made by a third person at the request of and with the authority of the debtor, and is received by the creditor in full satisfaction, there is a good accord and satisfaction, as the creditor receives a benefit in securing the payment by such third person; otherwise, due to the financial condition of the debtor, he may not have been able to secure payment of any part of the debt."

We are of opinion there is no testimony in this case to sustain the finding that there existed a contract of agency of legal force to defeat the third party exception to the rule plaintiff invokes, that the record conclusively discloses a settlement made with and payment of his own money by a volunteer, third party, a stranger to the demand and under no legal

obligation to pay it; that it was by authority of the debtor; was received and receipted for by the creditor in full satisfaction of his claim; and that it operated as a valid accord and satisfaction between the parties to this action.

The judgment is reversed.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

GUSTIN v. FITZPATRICK.

1. TAXATION—TITLE—NOTICE—LOGS AND LOGGING—TIMBER.

After a valid sale for taxes and after the period of redemption has expired, the State possesses the absolute title; the only interest which the landowner has is the privilege of securing a reconveyance upon sale to an individual by the State.

2. SAME—TIMBER—REPLEVIN.

The owner of the record title of land which has been sold to the State for delinquent taxes, the period of redemption having expired, and which is thereafter acquired by a purchase of the tax title, has no right to maintain replevin for posts and ties, cut on the premises, although a statutory notice has not been served by or on behalf of the holder of the tax interest.

Error to Cheboygan; Shepherd, J. Submitted June 3, 1914. (Docket No. 16.) Decided October 2, 1914.

Replevin by Henry K. Gustin against Thomas Fitzpatrick and Henry Fitzpatrick for a quantity of ties

and posts. Judgment for defendants upon a directed verdict. Plaintiff brings error. Affirmed.

H. K. Gustin, in pro. per.

Victor D. Sprague, for appellees.

BIRD, J. The plaintiff brought an action of replevin to recover the possession of certain fence posts and ties which he claimed to own, by reason of their having been cut from certain lands which he owned on section 24 in Cheboygan county. It was conceded that he acquired the original title thereto in July, 1906, and that the same was duly recorded in the register of deed's office for Cheboygan county. Plaintiff omitted to pay the taxes assessed thereon for the years 1906 and 1907, and, as a result thereof, the lands were sold and bid in by the State for the taxes of 1906. After the equity of redemption had expired, and on the 5th day of August, 1910, the lands were sold to the Michigan Land & Title Company. This company conveyed it to one William Gainor, who cut the fence posts and ties in the winter of 1910 and 1911, and sold them to the defendants. Neither the Michigan Land & Title Company nor Gainor served the statutory six months' notice required by the statute. The lands were wild and unimproved, and plaintiff never had the actual possession of them. Upon this state of facts the conclusion of the trial court was that, inasmuch as there was an outstanding tax title at the time of the commencement of suit, which plaintiff had made no attempt to redeem, or to obtain a reconveyance of, he could not maintain the replevin suit, and therefore directed a verdict for the defendants. The assignments of error present the question as to whether the trial court was in error in so disposing of the case. The question therefore pre-

sented by the record is whether the owner of the original title to lands may maintain replevin for timber cut therefrom, while a valid outstanding tax title is held by another, but before the six months' notice is given. It is conceded upon the record that the tax title held by Gainor is a valid one, but it is argued by plaintiff's counsel that, until he served the statutory six months' notice, the plaintiff has, or ought to have, such an interest in the lands as would entitle him to maintain the suit. Counsel present an able argument to the effect that the tax laws, construed as a whole, evince an intention upon the part of the legislature to leave such right in the original owner until the six months' notice terminated it. The difficulty of giving the provisions of the tax laws this construction becomes apparent from the repeated decisions of this court in which it is held that after a valid sale for taxes, and after the period of redemption has expired, the State possesses the absolute title to the land, and that the only interest which the landowner has is the privilege of securing a reconveyance upon a sale of the land by the State. *Griffin v. Kennedy*, 148 Mich. 583 (112 N. W. 756); *Haney v. Miller*, 154 Mich. 337 (117 N. W. 71, 745); *Haney v. Auditor General*, 165 Mich. 681 (131 N. W. 386); *White v. Dunsmore*, 167 Mich. 542 (133 N. W. 523).

If there is to be any change in the tax law as now construed by this court, we think it should be effected by additional legislation rather than by the court. The conclusion of the trial court was the proper one. The case is ruled by *White v. Dunsmore*, *supra*, where the questions are fully discussed.

The judgment is affirmed.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, MOORE, and STEERE, JJ., concurred.

PEOPLE v. GRIMM.

1. CERTIORARI—JUSTICES OF THE PEACE—RETURN.

The return of a justice of the peace in certiorari to review respondent's conviction of the crime of larceny must be taken as true.

2. LARCENY—VALUE—EVIDENCE—INFERENCES.

Testimony in a larceny case that the hog which respondent was accused of having stolen weighed 137 pounds and had been sold for about 10 cents a pound, sufficiently tended to prove the value of the animal and sustained a conviction of the charge: evidence as to value might properly be of an inferential character.

3. VENUE—CRIMINAL LAW—JUSTICES OF THE PEACE.

Testimony that stolen property was taken from the farm of a person in Dorr township, at the trial of a larceny case before a justice, sufficiently proved the venue to be in the county in which the action was tried and in which a township of Dorr was located; and the jury might properly take judicial notice that such township was situated in that county.

Error to Allegan; Cross, J. Submitted June 12, 1914. (Docket No. 102.) Decided October 2, 1914.

Louis Grimm was convicted of larceny and removed the cause to circuit court by certiorari. The conviction was affirmed. Respondent brings error. Affirmed.

Grant Fellows, Attorney General, and *E. W. Stone*, for the people.

Clare E. Hoffman, for respondent.

MOORE, J. This case was tried before a jury in justice's court. Respondent was convicted, sentenced, and then removed the case to the circuit court by a

writ of certiorari, where the same came on to be heard before the court on the 14th day of March, 1914.

The complaint and warrant charged respondent with stealing a hog of the value of \$13, of the property of Jacob Laube, at the township of Dorr, in Allegan county, this State, on the 1st day of December, 1913.

The affidavit for a writ of certiorari is in the usual form. The judgment and conviction is alleged to be void because:

(1) The testimony failed to show the value of the property alleged to have been stolen.

(2) There was no proof of venue.

(3) The testimony was insufficient to sustain a verdict of guilty.

The circuit judge sustained the conviction. The case is brought here by writ of error.

It is a well-established rule that the return to a writ of certiorari must be accepted as true. *Galloway v. Corbitt*, 52 Mich. 460 (18 N. W. 218); *Alt v. Lalone*, 54 Mich. 302 (20 N. W. 52); *People v. Etter*, 72 Mich. 175 (40 N. W. 241); *Henika v. Brown*, 155 Mich. 559 (119 N. W. 1083). Accompanying the application for the writ is what purports to be a transcript of the testimony.

The return of the justice contains the following:

"I do certify that the transcript of the testimony attached to said affidavit does not contain all the evidence given on the trial of said cause, and that the witness Frank Laube testified that the hog which it was claimed was stolen by the said Louis Grimm weighed the sum of 137 pounds, and that said hogs, one of which was stolen, had been sold to Mr. Pitsch at North Dorr, at the price of a little less than 10 cents per pound, which was conclusive evidence that the hog claimed to have been stolen was worth about \$13."

On the question of the proof of venue, the justice makes the following return:

"That the evidence produced on said trial was that the place where the hog was taken from was at the home of Jacob Laube, who lived on a farm about 2½ miles west of Dorr, in Dorr township, being south-east of here about five miles (the case being tried at Burnips Corners), and that said transcript of the testimony is not a true and correct transcript of the testimony given on said trial in the particulars above stated."

There is testimony in the transcript of the record also tending to show the venue.

1. Is there sufficient proof of value? The complaint states the value to be \$13. Does not the proof warrant a fair inference that the hog was of value?

In 2 Wharton's Criminal Law (11th Ed.), § 1190, the rule is stated thus:

"In order to constitute the offense of larceny * * * it is necessary at common law that the thing stolen be of some value, however small."

And in section 1194:

"There need be no direct evidence of value of the article stolen. The value may be inferred generally from the facts in evidence."

The note to this section contains a copious note to the same effect. Underhill on Criminal Evidence, § 298; McClain on Criminal Law, § 582; 25 Cyc. p. 127; 18 Am. & Eng. Enc. Law (2d Ed.), p. 519. We think the return shows that the requirements of the rule were met.

2. Was there proof of venue? The complaint was made and the case tried by a jury in a court held by a justice of the peace in Allegan county. The testimony was that the property was taken from the farm of Mr. Laube in the township of Dorr. Dorr is one of the townships in Allegan county. It was very proper for the jury and the court to take notice that the township of Dorr was in Allegan county. See *People v.*

Telford, 56 Mich. 541 (23 N. W. 213); *People v. Curley*, 99 Mich. 238 (58 N. W. 68); *People v. Ayers, ante*, 241 (148 N. W. 383).

3. Was the testimony sufficient to sustain a conviction? It would profit no one to quote the testimony. A careful reading of it satisfies us that, after listening to it, no normal juror ought to hesitate a moment in finding that relator was guilty of the offense charged.

Judgment is affirmed.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OS-
TRANDER, BIRD, and STEERE, JJ., concurred.

BOLENDER v. SOUTHERN MICHIGAN TELEPHONE CO.

TELEGRAPHS AND TELEPHONES—HIGHWAYS—SHADE TREES.

Shade trees in the highway adjacent to a farm belong to the owner of the land and may not be destroyed or injuriously trimmed by a telephone company in violation of 2 Comp. Laws, § 6691 (3 How. Stat. [2d Ed.] § 7214), Act No. 283, Pub. Acts 1909 (2 How. Stat. [2d Ed.] § 2348).¹

Error to St. Joseph; Knowlen, J. Submitted June 17, 1914. (Docket No. 88.) Decided October 2, 1914.

Case by William F. A. Bolender against the Southern Michigan Telephone Company for injuries done to shade trees in the public highway. Judgment for plaintiff. Defendant brings error. Affirmed.

¹ As to the liability to abutting owner for mutilating trees in highway by erecting poles or stringing wires, see notes in 12 L. R. A. (N. S.) 1125; 30 L. R. A. (N. S.) 1084, and 51 L. R. A. (N. S.) 1082.

H. P. Stewart (Boudeman, Adams & Weston, of counsel), for appellant.

George H. Arnold, for appellee.

MOORE, J. This suit is brought to recover damages for the cutting of shade trees by defendant company. From a judgment of \$250 in favor of the plaintiff, the case is brought here by writ of error.

The version of the plaintiff as to what happened is as follows:

"I reside in Lockport township; my farm joins on the west side of the village of Centreville. I have resided there 30 years. I am the plaintiff in this case. The Southern Michigan Telephone Company put a line along what is known as the Centreville road in the latter part of October, 1906, as near as I can remember. In putting that line through, they cut the crown right out of the trees that were in the road. There were 2 large oaks, 1 elm, and 39 hard maples. Those trees had been set out there when I bought the farm; they were quite nice trees. They were very thrifty trees. They had a nice appearance. After the cutting of the crown of them they looked pretty bad; the tops were all cut out. There is a row on each side of the street, and they are now about 10 feet lower than those on the other side. I couldn't say how much of the tops they took out, but they must have taken off 10 or 15 feet. There is branches there that are—oh, they are 6 inches in diameter, 5 or 6 inches, standing straight up; the heart of the tree is cut off. Those limbs have died down now, and the bark is all off about 4 feet from the top, they are dead. * * * The damage by depreciation of the farm is at least \$1,000."

It was the claim of defendant that it did no more trimming than it was obliged to do, and that, in fact, no injury was done to the trees or the farm.

We quote enough from the brief of counsel to present its claim:

"The case is peculiar in this, that here was, by a public service corporation, a public work which of necessity must be placed within the public highway, and which was authorized to be so constructed.

"It is just as essential that a telephone line be constructed as it is that a telegraph line, a sewer, a waterworks, an electric light plant, a gas plant, or a railroad be built. Perhaps these various public service concerns are not all of equal value to the community, but certainly our modern civilization calls for the use of the telephone more than it does for some of the other things mentioned, although all of such things are of considerable convenience. * * *

"A highway is made for public convenience and as a public necessity, and the person who owns the land over which such highway passes is paid for his land which is taken just the same as he is paid for it if a railway company takes a portion of his land for railway purposes. If a railroad gets and pays for 100 feet in width across a farm, the man who formerly owned the strip has no right to plant trees on it, and on principle he ought not to have any more right to plant trees upon the land taken for the public use as a highway. * * * This action is one of trespass upon his lands, according to the plaintiff's declaration. The trees in question standing in a public highway, there could be no trespass on the lands described. If any right of action accrued to plaintiff on account of the alleged cutting of these trees, it was an action of trespass on the case, not for an entry and trespass upon his farm, but for the injury of property in which he had an interest standing within the highway."

These various claims make it important to consider the status of the parties.

In 4 Words and Phrases, under the subject "Highway," at page 3297, appears the following:

"A highway is nothing but an easement comprehending merely the right of all the individuals in the community to pass and repass, with the incidental right in the public to do all the acts necessary to keep it in repair. This easement does not comprehend any interest in the soil, nor give the public the legal pos-

session of it. *Adams v. Rivers*, 11 Barb. (N. Y.) 390, 398; *Kelsey v. King*, 33 How. Prac. (N. Y.) 39, 44; *Peck v. Smith*, 1 Conn. 103, 132 (6 Am. Dec. 216); *In re Road from Fitzwater St. to Shippen St.*, 4 Serg. & R. (Pa.) 106; *Starr v. Camden & A. R. Co.*, 24 N. J. Law, 592, 597; *Smith v. City of San Luis Obispo*, 95 Cal. 463 (30 Pac. 591, 593); *Newton v. New York, N. H. & H. R. Co.*, 72 Conn. 420 (44 Atl. 813, 815); *Lynch v. Town of Rutland*, 66 Vt. 570 (29 Atl. 1015, 1016)." * * *

"Highways are regarded as easements in the land over which they are laid out; hence the owner of the land is not divested of his title, but it is merely made subject to the easement. When a highway is laid out the public acquires no more than a right of way with the powers and privileges incident to that right, such as digging the soil, cutting timber and other materials within the space of the road in a reasonable manner for the purpose of making and repairing the road and its bridges. *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447, 452 (8 Am. Dec. 263 [cited and approved in *Whitbeck v. Cook*, 15 Johns. [N. Y.] 483, 490, 8 Am. Dec. 272])." * * *

"A public highway is a way in which the public are entitled to a right of passage. The title to the soil, stone, etc., in such a way continues in the owners of the lands over which the way passes. The land is merely dedicated to the public for particular purposes. *Chambers v. Furry*, 1 Yeates (Pa.), 167, 169."

Whatever may be said of the rights of the public in the streets of a city, we think these quotations are descriptive of the rights of the public in a country highway.

In *Clark v. Dasso*, 34 Mich. 86, Chief Justice COOLEY, speaking for the court, made use of this language:

"The policy of our laws, as is clearly indicated by the statute already quoted, favors the planting and preservation of shade trees in the public streets where they do not constitute actual obstructions. Undoubtedly there must be some officer clothed with authority

to protect the highways against the excessive planting or the improper location of trees, and the commissioner of highways is a very suitable officer to be intrusted with this authority in the townships. But, where he is authorized to order the removal of shade trees, it is a great mistake to assume that he may exercise his power in a wanton or reckless manner with impunity. Certain principles must always govern the action of these officers, if they are to keep within the protection of the law. In the first place, the policy of the law is to be considered, which would be wholly defeated if one had no better protection for his shade trees than the whim or caprice of successive commissioners, any one of whom might destroy in an hour all that had been accomplished in many years. Then, again, it is to be remembered that the trees are the property of the adjacent owner, who cannot lawfully be deprived of any species of property in the summary mode which was adopted in this case."

In *People's Ice Co. v. Steamer "Excelsior,"* 44 Mich. 229 (6 N. W. 636, 38 Am. Rep. 246), Justice MARSTON made use of the following language:

"Ordinarily it may be said that the entire width of the highway may be used, yet the owner of the land over which it passes may, within the limits thereof, plant trees, set posts, and do such other acts as will add to his convenience or assist in beautifying his premises. He is encouraged in doing this by public sentiment; in the remission of taxes by the public authorities for the planting of trees; and in the protection which the law gives him by the punishment of those who interfere with or destroy what he has done. Public convenience may in time in particular locations require the removal of some of these things, and, whenever the necessity arises and the public authorities request their removal, then the private must give way to the public or paramount right. But while permitted to remain, no one traveling the highway could wilfully injure or destroy them, and should any one do so he would justly be held responsible, notwithstanding his plea of a claim of right to travel over any part of the highway. If the law were other-

wise, the streets in our cities and villages, and our public highways, would soon be stripped of their shade and ornament. *Clark v. Dasso*, 34 Mich. 86."

The legislature has recognized the desirability of shade trees in highways and in 2 Howell's Statutes (2d Ed.), § 2345, provides many details as to where they shall be placed. Section 2346 authorizes the highway commissioner to set out shade trees and to expend a share of the public moneys for that purpose. Section 2348 reads as follows:

"2348. SEC. 4. Telephone companies shall have power to construct and maintain lines of wire or other material, for use in the transmission of telephonic messages along, over, across, or under any public places, streets and highways, and across or under any of the waters in this State, with all necessary erections and fixtures therefor: *Provided*, that said telephone companies, before the construction and erection of said telephone lines and poles, shall first obtain the consent of the duly constituted authorities of the city, village or township through or along which said telephone lines and poles are to be constructed and erected: *Provided further*, that the same shall not injuriously interfere with other public uses of the said places, streets and highways, or injure, deface, tear, cut down, or destroy any tree or shrub planted along the margin of any highway in this State, or purposely left there for shade or ornament nor shall the same interfere with the navigation of said waters, or the running of railway trains."

We had another statute in relation to telephone companies and the rights possessed by them in the highways. That statute was construed in *Wyant v. Telephone Co.*, 123 Mich. 51 (81 N. W. 928, 47 L. R. A. 497, 81 Am. St. Rep. 155), and a reference to that opinion will show it to be in harmony with some of the views expressed by counsel which we have already quoted, but, after that opinion was handed down, the

so-called "telephone statute" was amended so as to now read as follows:

"Every such corporation shall have power to construct and maintain lines of wire or other material, for use in the transmission of telephonic messages along, over, across, or under any public places, streets and highways, and across or under any of the waters in this State, with all necessary erections and fixtures therefor: *Provided*, that the same shall not injuriously interfere with other public uses of the said places, streets, and highways, or injure any trees located along the line of such streets or highways." Section 7214, 3 How. Stat. (2d Ed.), 2 Comp. Laws, § 6691.

The statute we have just quoted was construed in *Boland v. Telephone Co.*, 161 Mich. 315 (126 N. W. 425). The opinion in that case settles against the contention of appellant many of the questions involved in this case.

The instant case, then, presents a situation where the plaintiff is the owner in fee of the land where the shade trees are, with the public having an easement in the highway, which is properly described in the quotations we have made from Words and Phrases. The telephone company has such rights in the highway as the statutes of the State have given it, and it possesses no other rights therein. The language used in sections 2348 and 7214, which we have quoted, is not ambiguous. No right is given in those sections, to a telephone company, to injure, cut down, or destroy any shade tree; not only so, but to do those things is forbidden. As the rights of the company are limited by the statute, when it goes outside of the limitations imposed by the statute, it becomes liable in damages.

We find no reversible error.

Judgment is sustained.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

LAKE-ULRICKSEN CO. v. GRAND LODGE I. O. O. F.

PRINCIPAL AND AGENT—CONTRACTS—DIRECTING VERDICT.

In an action for coal which plaintiff claimed to have provided for use during the construction of a society home for indigent members or families of defendant, evidence considered and *held*, to present an issue of fact whether the board having charge of the construction work authorized the purchase of the materials.

Error to Jackson; Parkinson, J. Submitted June 19, 1914. (Docket No. 23.) Decided October 2, 1914.

Assumpsit in justice's court by the Lake-Ulricksen Company against the Grand Lodge of Independent Order of Odd Fellows for coal sold and delivered. From a judgment for plaintiff defendant appealed to circuit court. Judgment for plaintiff. Defendant brings error. Affirmed.

Brakie J. Orr, for appellant.

John E. Shekell, for appellee.

MOORE, J. During the years 1907 and 1908, the defendant caused to be erected in Jackson, at an expense of upwards of \$30,000, a home for its aged and indigent members and their widows and orphans. The contract for the construction of the building was let to Doland & Co. The plaintiff furnished materials that went into the building, and coal which was used to heat the building during the construction. The bill, amounting to more than \$2,000, was paid, except the coal bill, amounting to about \$51. It was to collect this amount suit was brought in justice's court. No contest was made in that court by defendant. From a judgment in favor of the plaintiff, an appeal was

taken to the circuit court, where a trial was had before a jury. From a verdict and judgment in favor of the plaintiff of \$63.56, the case is brought here by writ of error.

There are many questions argued by counsel for the appellant, but the decisive question is whether the court erred in submitting the case to the jury instead of directing a verdict for the defendant, as requested. As before stated, the defendant let a contract for the construction of the building to Doland & Co. It is the plaintiff's claim that, soon after entering upon the work, this company became financially embarrassed, and that an arrangement was made which we cannot state better than to quote the substance of the testimony of Mr. Ulricksen, a member of the plaintiff company, as follows:

"Shortly after Mr. Doland commenced this building as contractor, Mr. Barr, with whom I had a number of conversations, in one of the earlier or first conversations with me, told me that Mr. Doland had taken the contract at a considerably lower figure than the others, and that he was financially unable to carry on the work, not having any capital; that the board, of which Mr. Washington L. Barr was president, had taken out of Mr. Doland's hand the financial end of the affair; and that, if we continued to furnish material for the building, we should render invoices for each and every item as delivered, and at the end of each month render an itemized statement for Mr. Doland to check up his invoices with, so that he could pass them on to the architect for his approval and estimates, and that payments would be made direct to us by the board of control. This arrangement was carried out absolutely to the letter, and on a number of occasions I personally brought monthly statements to Mr. Doland myself. Payments upon this account were made by mail by checks, as shown here this morning, but in no instance were settlements in full for any monthly statements made; in other words, the checks received were only to apply on account of the previous

statement as rendered. I could explain that more fully by saying that on December 31st we have a credit of \$800, which applied on a statement rendered December 1st of \$950. * * * Prior to making this payment of \$800, we had delivered on November 26th one item of coal and another one on December 23d. These items were included in that statement. When this check was sent for \$800, no attention was called to the fact they did not intend to pay for the coal items or any other item, but simply to apply on account. We had another remittance March 12th, which was shown this morning, of \$300. Between the payment of the \$800 on December 24th and March 12th we delivered three different lots of coal, one on December 9th, \$8, one on February 6th, \$11.80, and one on February 13, \$11.80. There was nothing indicating any items would be kept out. * * * Bills including the coal were rendered every month, and remittances were made while these deliveries were being made, but not for the full amount of the bills rendered. There never was any statement from anybody that the omissions to remit in full were on account of the coal items and on no items never. The first that we knew at all about the coal items having been taken out and eliminated was their last settlement, which was made on July 24, 1908. * * * We have received no remittance from them since then. There is a balance of \$55.51 that hasn't been paid for stuff we furnished to the Odd Fellows' Home."

Before this testimony was received, Mr. Barr was called as a witness by the plaintiff. He denied that he had a talk with Mr. Ulricksen of the nature indicated in his testimony, and denied that he had any authority to make any such arrangement. In his testimony the following appears:

"To the best of my recollection I never saw Mr. Ulricksen there only on two different occasions. I know who had charge of the building of that home. It was built by the Odd Fellows of the State of Michigan. The Grand Lodge furnished the money and built the home. It belongs to them, and always has. I was a member of the board of control at the time the home

was built. The board represented the Grand Lodge in the building of the home. I was president of the board of control. The Grand Lodge had the charge of the building of that home, and the board of control represented the Grand Lodge in the building of it, and was given certain money to expend for the building of it. Reports were made to them and through them to the Grand Lodge in the interim. They represented the Grand Lodge in the interim, and, as far as I know, represented the Grand Lodge in the building of the home. I went upon the board in October, 1906, and resigned in October, 1909.

"Q. Now, just tell what the board had to do with the building of the home out there, Mr. Barr. * * * What did you have to do with it—your board?

"A. There was an architect employed to furnish plans and specifications. Those plans and specifications were accepted by the board of control, and the board advertised for bids, and the contract for the building of the home was let to John L. Doland & Son, of Battle Creek. E. A. Bowd, architect, of Lansing, was employed as supervising architect. We paid the bills upon estimates given from time to time, according to the terms of the contract. I can't tell you who signed the contract with Doland & Sons, whether the board signed it or the officials of the Grand Lodge. The secretary, Mr. Wilde, will be able to tell that. * * *

"Q. You made the arrangements; the board of control, you as president, made arrangements with Mr. Doland, didn't you?

"A. I should say, yes. The board of control was constituted, I think, at that time, of Mrs. Ida M. Bailey, of Traverse City, R. G. Jackson, of Negaunee, was treasurer, and Theodore Merrill, of Kalamazoo, and Mrs. Addie F. Carpenter, of Grand Rapids—in 1906. * * * It was the duty of this board to make the contract, employ an architect, and see that the home was built. I was president of the board, but had no duties whatever in regard to the home, other than being a member of the board. We simply acted as a committee, and represented the Grand Lodge in the interim of Grand Lodge meetings, making full report of our actions to the Grand Lodge at the proper time, and were given that authority by the Grand Lodge.

"Q. Now, after you—you did employ an architect yourself, didn't you?

"A. The board did.

"Q. You, as president?

"A. Yes. * * * I was represented here in this city by Mr. W. J. Evans, who made weekly and often daily reports to me at my home in Cheboygan, Mich. The estimates of the architect were handed by Mr. Doland to W. J. Evans, of the city of Jackson, who mailed them to me, and I sent them to the secretary. * * * We added extras to the building, new furnishings, and so on, put seats in what we called the assembly room; they were ordered by the board by myself, and paid for on our order from requisitions we drew, out of the funds furnished by the Grand Lodge for the maintenance of the home itself and for permanent improvements."

There was also introduced in evidence three checks, all alike except dates and amounts, one of which reads as follows:

"Union Bank

No. 78.

"JACKSON, MICH., Dec. 27, 1907.

"Pay to the order of Lake-Ulricksen Co., \$800.00 eight hundred and no/100 dollars.

"GRAND LODGE, I. O. O. F. OF MICHIGAN,

"WASHINGTON L. BARR, Pres.,

"BOARD OF MANAGEMENT, ODD FELLOWS' HOME, BUILDING FUND.

"JOHN A. WILDE, Sec'y."

And a letter which came with the last check, reading as follows:

"July 22/08.

"LAKE-ULRICKSEN CO.,

"Jackson, Mich.

"Gentlemen:

"Inclosed please find check for \$128.30, balance due for materials furnished John L. Doland & Son, contractors for the Odd Fellows' Home Building at Jackson, Mich.

"This covers the amount of your itemized statement,

182 Mich.—42.

less \$55.51 for coal, which you will please present to Mr. Doland for settlement.

“Very truly yours,

“JOHN A. WILDE,

“Sec’y Board of Management.”

Explanations were made, on the part of the defendant, as to the giving of these checks and the sending of the letter which it is insisted makes them inadmissible as evidence against the defendant for any purpose.

There is other testimony which we will not quote, which plaintiff insists tends to support its theory that agency has been shown, or at least an appearance of agency upon which it was authorized to act. We think, in view of the relation this board of control sustained toward the procuring of the plans and the making of the contract for the erection of the building, and the dispute between the plaintiff and Mr. Barr, that the question of agency could not be decided as a matter of law, under *Whitaker v. Kilroy*, 70 Mich. 635 (38 N. W. 606); *Hirschmann v. Railroad Co.*, 97 Mich. 384 (56 N. W. 842); *Constantine v. Beet Sugar Co.*, 132 Mich. 480 (93 N. W. 1088); 1 Am. & Eng. Enc. Law (2d Ed.), p. 990, and the many notes thereto.

Judgment is affirmed.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

GABLE v. TOWNSHIP BOARD OF THREE OAKS.**1. INTOXICATING LIQUORS — RETAIL LIQUOR DEALERS — BOND — LICENSE—APPROVAL—TOWNSHIPS—MUNICIPAL CORPORATIONS.**

Townships have no authority to suppress the liquor traffic by ordinance.

2. SAME—BOND—REJECTION.

It is not within the authority of a township board to reject a bond offered by a retail liquor dealer who applies for a license, on the ground that the instrument is signed by a surety company, without reference to the legal sufficiency of the bond or an investigation as to the actual responsibility of such surety.

3. SAME—APPLICATION—PLACE OF BUSINESS.

Only the township, ward or village in which the applicant proposes to do business need be stated in the application: any additional information, whether correctly given or not, should be treated as surplusage. Act No. 291, Pub. Acts 1909 (3 How. Stat. [2d Ed.] § 5058).

4. SAME—BOND—REQUISITES.

However, the rule is different as to the bond, which must distinctly describe the locality and place where he proposes to establish the business, and the lot or building and location must be exactly stated so as to distinguish it from any other and prevent the licensee from moving without securing permission of the township or other authorities.

5. SAME.

Although application and bond may be considered and approved at the same meeting, and are sometimes passed upon together, the application should be considered first. And while the rejection of the bond may have been warranted because it failed to state, with sufficient particularity, the place where relator intended to conduct his saloon, mandamus will issue to compel respondent to reconvene and approve a proper application.

Certiorari to Berrien; Bridgman, J. Submitted

July 25, 1914. (Calendar No. 26,288.) Decided October 2, 1914.

Mandamus by David F. Gable to compel the township board of Three Oaks to reconvene and approve his application for a retail liquor dealer's license and to approve his bond. Relator reviews on certiorari an order denying the writ. Reversed.

O'Hara & O'Hara, for appellant.

Gore & Harvey, for appellee.

STEEERE, J. This proceeding is instituted to review on certiorari the action of the circuit court of Berrien county in denying relator a writ of mandamus to compel the township board of Three Oaks township, in said county, to approve his bond and application for a liquor license. Said township, exclusive of a village of the same name within its boundaries, contains a population of 793 persons, according to the census of 1910, and no saloon for the sale of intoxicating liquors has existed in said township for many years.

On April 18, 1914, relator filed with the clerk and presented to the township board of said township his application for a liquor license and bond in connection therewith, in the sum of \$6,000, signed by himself and the Michigan Bonding & Surety Company. The bond was a regular liquor dealer's surety company bond, and the application followed the usual form, in general compliance with the statutory requirements, stating, however, as to location:

"That the place in which he proposes to carry on such business is the one-story frame building in the east part of the east one-half of southeast quarter, section 4, town 8 south, range 20 west, in the township of Three Oaks," etc.

The same description of the "place of business" is also set out in the bond.

At a meeting attended by all members, held April 22, 1914, the township board unanimously rejected said bond and application.

On April 25, 1914, relator applied to the circuit court of Berrien county for a writ of mandamus to compel said board to "convene and approve the application for license and liquor bond of your petitioner," etc., upon which the court issued an order requiring said board to show cause why the writ applied for should not be granted. Return to said order and answer to relator's petition having been made, the court, after a hearing had thereon, denied said petition and refused to issue the writ of mandamus as requested. The return to this writ of certiorari comprises copies of the petition and answer, with other files and records, including the opinion of the court in said mandamus proceeding. The facts are practically undisputed.

The verified return and answer of the township board to the order to show cause, amongst other reasons, stated that an investigation revealed there "is no one-story frame building in the east part of the east one-half of the southeast quarter of section 4, town 8 south, range 20 west, in the township of Three Oaks, Berrien county, Mich., and respondents also aver that said David F. Gable is not the owner of any land in the east part of the east one-half of the southeast quarter of section 4, and has no valid lease or rights therein, said lands and premises now being occupied and used by Schuyler Ray for farming purposes;" that an ordinance, a copy of which is set out, previously adopted by said board, prohibiting the licensing of saloons for the sale of intoxicating liquor in said township, was in force when such application was made; that said bond was refused, as appears by the record of said meeting, "for the reason that said township

board does not deem the said surety company a proper, responsible, or sufficient surety," and under the law and facts "respondent had a legal right to reject both the application and bond."

Most of the questions raised in this proceeding were reviewed in full and determined contrary to respondent's contentions in the recent cases of *Price v. Township Board of Oakfield*, ante, 216 (148 N. W. 438) ; *McCabe v. Township Board of Burnside* 181 Mich. 683 (148 N. W. 197).

It is sufficient to state that, under those decisions and others which have gone before, township boards have yet no authority to suppress the liquor traffic by enacting prohibitory ordinances. The ordinance which respondent pleads as justifying it in rejecting relator's application was without authority of law and void. Neither was it within the power of the board to arbitrarily reject relator's bond on the ground that it was a surety company bond, without reference to its legal sufficiency, or without honestly and in good faith making an investigation of and determining the actual responsibility of the surety.

The remaining ground of refusal, that the "place of business" is not sufficiently nor truthfully described, is of legal force as to the bond, but not as to the application. For the latter, the statute only requires the applicant to state the "ward, village or township" in which it is proposed to carry on such business. Section 4, Act No. 291, Pub. Acts 1909 (2 How. Stat. [2d Ed.] § 5058). This application distinctly states that it is proposed to carry on such business in the township of Three Oaks, Berrien county, State of Michigan. All further description is mere surplusage.

But, when the applicant comes to present his bond for approval, he is required to be more definite in stating the locality, and the designated place where he

proposes to establish his business must be distinctly described, to the exclusion of any possibility of migration, so that the exact building, lot, location, or place is plainly pointed out and can be distinguished from any other, for the licensee is prohibited from carrying on the business in any other building or place than that specified in said bond, without first giving notice, securing consent of the local authorities, and executing another bond describing the new location. Section 8 of said act; *People v. Lester*, 80 Mich. 643 (45 N. W. 492); *People v. Brown*, 85 Mich. 119 (48 N. W. 158). The bond was clearly questionable in the particular stated, and, when it further appeared that no such building as it assumed to describe was in existence in that locality, respondent was legally justified in rejecting it.

Although it is common for the presentation and consideration of an application and bond to take place at the same meeting of the municipal board, and the two are often taken up together, the application must nevertheless be considered and passed upon first. Each should be separately considered in its proper order. It would of course be idle for an applicant to present a bond if his application was legally rejected, but the opportunity is given him to procure his bondsmen, and execute and present his bond after he ascertains his application is approved. Section 4 of said act, amongst other things, provides:

"If such application shall be approved by said board as provided in this act, such applicant shall then present to said board for approval a bond. * * * Such approval of any such application shall expire and be null and void if the applicant therein does not, within two weeks of the date of such approval, execute the satisfactory bond, secure the approval of such bond," etc.

Relator's petition asked that respondent be directed

to reconvene and do two things: *First*, grant his application for a license; and, *second*, approve his bond.

While the refusal to approve the bond found support in the statute, and was justified for the reason stated, the only reason shown for rejecting the application at any time, calling for serious consideration, is its claim that the so-called Warner-Cramton law, as amended, authorized township boards to prohibit and suppress the liquor traffic within the township. That question has since been settled against respondent's contention, in the recent cases before mentioned, and we are constrained to conclude that, as to relator's application for a license, the writ of mandamus prayed for must be granted directing said township board to reconvene and reconsider relator's application, and if found without legal objections, in compliance with the statute, to approve the same.

In view of the condition of the law at the time of respondent's refusal, we are satisfied that its members acted in good faith. For this, and the further reason that good cause was shown for not approving relator's bond, no costs herein will be allowed to either party.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

BOARD OF EDUCATION OF TRAVERSE CITY v. STRAUB.

1. CONSTITUTIONAL LAW—CHARTERS—MUNICIPAL CORPORATIONS—
TITLE—LOCAL ACTS—SCHOOLS AND SCHOOL DISTRICTS.

A local act entitled "An act to incorporate the city of Traverse City in the county of Grand Traverse, and to repeal all acts and parts of acts in conflict therewith," was sufficiently entitled to warrant the inclusion of provisions for the board of education and establishing a school district (Act No. 424, Local Acts 1895); especially after 20 years had passed during which the board of education had exercised its franchise and privileges as authorized by the act; and in view of 2 Comp. Laws, § 4650 (4 How. Stat. [2d Ed.] § 9871), providing that school districts shall be presumed to be legally organized after exercising the franchise of a district for two years.

2. SAME—SCHOOLS AND SCHOOL DISTRICTS.

The legislature by Act No. 279, Pub. Acts 1909 (2 How. Stat. [2d Ed.] § 5442), has retained sole power to alter, amend or repeal special acts affecting the public schools. The electors of a city have no authority to amend the provisions of an act establishing the school district of Traverse City, by including matters in relation thereto in a new charter adopted under the Constitution and laws of 1909.

3. SCHOOLS AND SCHOOL DISTRICTS—BONDS—BOARD OF EDUCATION
—AUTHORITY TO ISSUE.

The school district of the city of Traverse City was authorized to issue bonds to raise money to build and repair school buildings, under the provisions of the general law, which are made applicable by the express terms of section 10, title 7, of Act No. 424, Local Acts 1895.

4. SAME—BONDING LIMIT—STATUTES.

And the limit of bonded indebtedness fixed by Act No. 12, Pub. Acts 1911 (4 How. Stat. [2d Ed.] § 9932), amending 2 Comp. Laws, § 4717, and providing that the district may issue bonds up to 10 per cent. of the assessed valuation or \$100 per capita, based on the census of school children,

was also applicable to said city, under section 10, title 7 of the local act.

5. SAME—ELECTIONS.

And, on the same ground, the election might be held at an annual or special meeting as the general law authorizes.

6. SAME—DELAY IN ISSUANCE.

The fact that the bonds were voted in 1913 and not issued until the next year would not be a reason for challenging their validity, the evidence tending to show that a contract had been let for the building of a schoolhouse and that the money was not needed until the later date.

Certiorari to Grand Traverse; Mayne, J. Submitted July 25, 1914. (Calendar No. 26,317.) Decided October 2, 1914.

Mandamus by the board of education of the city of Traverse City against John G. Straub, mayor of the said city, to compel respondent to sign a series of bonds. Writ denied: relator brings certiorari. Reversed.

Covell & Cross, for appellant.

John W. Patchin, for respondent.

MCALVAY, C. J. These are certiorari proceedings to review the action of the circuit court for the county of Grand Traverse in denying relator a writ of mandamus. Relator is a school district comprising all the territory within the limits of the city of Traverse City. Act No. 424 of the Local Acts of Michigan was passed by the legislature of 1895, said act being entitled:

“An act to incorporate the city of Traverse City, in the county of Grand Traverse, and to repeal all acts and parts of acts in conflict therewith.”

This was the act under which this city, formerly a village, was incorporated. By title 7 of said act the following provision is made:

"PUBLIC SCHOOLS.

"SEC. 1. The city of Traverse City shall constitute one school district. The members of the board of education shall be a body corporate by the name and style of 'The Board of Education of Traverse City,' and by that name may sue and be sued, and shall be subject to the laws of this State relative to corporations that may be applicable thereto. They shall hold and control all moneys, real and personal property, or other rights belonging to said school district, and shall use and expend the same solely for the benefit of the public schools of said city."

By amendments to section 2, tit. 4, and to section 2, tit. 7, of this act, made by Act No. 631, Local Acts of 1905, it was provided that the board of education should consist of the mayor and five resident electors duly elected at the annual election of 1906, and annually thereafter one or more members for the term of three years. These members of the board of education were to be elected at the annual city election. The mayor was designated as president, the city treasurer as treasurer, and the city clerk as clerk of said board of education.

Title 7 also contained the further material provision:

"SEC. 10. All provisions of the general laws of this State relative to schools shall apply and be in force in said city except such as may be inconsistent with the provisions of this act, or with the by-laws and ordinances of the board of education made under this act."

From the time of its creation under the act of 1895 up to the present time relator continued to exist as a body corporate and to administer the affairs of this school district by virtue of the powers and authority thereby granted. On February 28, 1913, claiming by authority of the act under which it was incorporated and amendments thereto, and all applicable provisions

of the general laws of this State relative to public schools, relator, having determined that a greater sum of money was required for the erection and repair of school buildings within said district than could be raised by tax in any one year, under the city charter, adopted a resolution providing for submitting to the electors of the district the question of borrowing \$78,000 and issuing bonds therefor at the regular election in said school district, to be held April 7, 1913. This election resulted in a vote of 1,105 votes cast in favor of, and 333 votes against, the proposition.

Having been authorized by a majority of the electors voting at this election to borrow said money and issue bonds therefor, the said board of education secured and adopted plans for a proposed school building, and on May 29, 1913, entered into a contract for the erection of a new school building, for the sum of \$39,759. The contractor, under said contract, at once began the construction of the same, which, at the time mandamus proceedings were instituted, was nearly completed. Relator also adopted by resolution the form of the bonds to be issued, caused the same to be prepared for execution, and afterwards presented them to the mayor to be signed by him as its president. Respondent, mayor of Traverse City, refused to sign such bonds as president of the board of education and gave his reasons therefor in writing. Thereupon relator authorized by resolution the institution of proceedings against respondent for a writ of mandamus to compel him to sign said bonds. The petition was duly filed and served. Respondent answered, and upon the issue presented a hearing was had which resulted in an order and judgment of the court denying such writ. The case is before us for review upon a writ of certiorari sued out by relator.

Relator and appellant groups the questions to be considered, stating them as follows:

"(1) Legality of the organization of the school district.

"(2) Effect upon the school district of the adoption of the revised charter of 1913.

"(3) Authority of the school district to issue bonds.

"(4) Legality of the bonding election.

"(5) Effect of the lapse of time since bonds were voted."

1. Respondent questioned the legality of the organization of the school district upon the ground that in the title of Act No. 424 of the Local Acts of 1895, under which the city of Traverse City was incorporated, the organization of a school district is not included, and therefore it is invalid within the prohibition of the Constitution that no act shall embrace more than one subject, which shall be expressed in its title. As far as we are able to find, this is the first time this question has been raised. Local acts for the incorporation of cities from the time of the adoption of the Constitution of 1850 have been passed by the legislature repeatedly entitled in practically the same language as the act in question, and have provided for the organization of school districts, creating all the usual and necessary machinery for establishing and conducting public schools within their limits. Further, chapter 88, 1 Comp. Laws, which makes provision for the incorporation of cities, being Act No. 215, Pub. Acts 1895 (being the year in which the act under consideration was passed), is entitled "An act to provide for the incorporation of cities of the fourth class."

Section 1 of the chapter of this act devoted to "Education" (being compiler's section 3338) provides:

"Each city incorporated under this act shall constitute a single school district. Such school district shall be a body corporate, by the name and style of the 'public schools of the city of _____' * * * and shall possess the usual powers of corporations for

public purposes; and in that name may sue and be sued, and purchase, acquire, hold and dispose of such real and personal property as is authorized to be purchased, acquired or disposed of by this chapter.
* * *

In the case of the charters of other cities, as well as the one under consideration, which have been granted by special acts of the legislature to municipalities and accepted by them, it is clear that the matter of providing schools and the means of education has always been considered an important part of the functions of every municipality the organization of which was as essential as the organization of any department of the city government. Not only does this appear from the repeated instances of granting charters to cities providing for the organization of public schools without designating that subject in the title, but also from the fact that for many years this has continued to be accepted by the legal profession as a proper construction of such entitling.

Relator, from the time of its incorporation under and by virtue of the act of 1895 up to the present time, as a body corporate has exercised the franchises and privileges of a school district for about 20 years. By statute it is presumed to have been legally organized.

“ * * * Every school district shall, in all cases, be presumed to have been legally organized when it shall have exercised the franchises and privileges of a district for the term of two years. * * * ” Sec. 4650, 2 Comp. Laws (4 How. Stat. [2d Ed.] § 9871).

There is no merit in the claim that title 7 of the act in question is void because the matter of establishing a school district is not expressed in the title.

2. By reason of the adoption of a revised charter by the electors of the city of Traverse City in 1913, respondent claims that the provisions of Act No. 424

of the Local Acts of 1895 are repealed and he is no longer president of the board. The act under which this charter was revised is Act No. 279, Pub. Acts 1909 (2 How. Stat. [2d Ed.] § 5442 *et seq.*), entitled "An act to provide for the incorporation of cities and for changing their boundaries." In the revised charter, under title "The Board of Education," we find the following provision:

"SEC. 230. The city of Traverse City shall constitute a single school district. The board of education shall be a body corporate by the name and style of the Board of Education of Traverse City," etc.

An examination of this act shows that this subject was not expressed in the title, and that the body of the act expressly prohibited any such local legislation.

"Each city may in its charter provide: * * * (p) for altering, amending or repealing any special act affecting any existing municipal department, but the department in control of the public schools shall not be construed to be a municipal department." Section 4, Act No. 279, Pub. Acts 1909, subd. p, p. 500.

This section provides for permissive changes which may be made in existing charters. In the subdivision above quoted the fixed legislative intent already mentioned—to protect and preserve the public schools of the State—is apparent, and interference with such schools is prohibited. It does not require argument in view of the provisions of this act to make it clear that the legislature retained in itself the sole power to alter, amend, or repeal special acts affecting the public schools of the State. The electors of Traverse City, therefore, had no authority to amend the provisions of Act No. 424, Local Acts of 1895, relative to public schools, being title 7 of said act.

It follows that the adoption of the revised charter of 1913 in no manner changed or affected the status or powers of relator as a body corporate or the pro-

visions of the original charter respecting the public schools of the city of Traverse City, and that respondent is the president of the board of education of the city of Traverse City, the relator herein.

3. The authority of the school district to issue bonds is challenged by respondent not only upon the ground that it no longer is a legal entity, but that under the provisions of the charter of 1895 no such authority was given. In a recent case this question was considered at length and passed upon against the contention of respondent.

In the case of *Public Schools of Muskegon v. Smith*, 173 Mich. 570 (139 N. W. 264), which upon its facts is very similar to the instant case, relator was incorporated under Local Act No. 281 of 1899, which, among other things, contained in identical words the provisions above quoted from the act under which relator was incorporated respecting all provisions of the general laws of the State relative to public schools being applicable and in force in said district. This court held that, under its charter and the laws of the State relative to public schools, the relator was authorized to raise money by taxation for the purposes intended and to issue bonds for the same. Under the charter creating it relator in the instant case was in terms authorized, among other things, to raise money to repair schoolhouses, and in the notice under which the election was held it was expressly stated that the money raised was to be expended for the erection and repair of school buildings.

A further contention bearing upon the legality of the bonds is that the amount to be raised was larger than authorized by the charter. This court held, in *Public Schools of Muskegon v. Smith, supra*, that the provisions of the general school laws are applicable to relator's district, under section 4717, 2 Comp. Laws,

as amended by Act No. 12, Pub. Acts 1911 (4 How. Stat. [2d Ed.] § 9932). It therefore follows the sum of \$78,000 was within the limit provided by this section as amended, and consequently authorized by law.

4. Respondent challenges the legality of the bonding election. This contention is based upon the claim that the bonding election was held at the annual meeting of the district, and not at a special meeting called for that purpose, as required by the terms of section 7, tit. 7, of the act under which relator was incorporated. We again refer to the holding in the case of *Public Schools of Muskegon v. Smith, supra*, that the provisions of the general school laws are applicable and may be invoked by relator. Under the provisions of section 4717, 2 Comp. Laws, as amended, *supra*, such questions may be submitted at an annual or a special meeting called for that purpose.

5. Another question presented relates to the matter of delay in issuing these bonds. They were voted in April, 1913, and issued for signature in April, 1914. This question was suggested by respondent in the case of *Public Schools of Muskegon v. Smith, supra*, but was not passed upon. In the instant case it appears that relator, within 30 days after it was authorized to issue bonds for the purposes mentioned, let a contract for the construction of this school building, and that the same had proceeded almost to completion at the time the bonds were issued and presented to respondent for his signature. A necessary inference would be that these bonds were not issued until needed. We do not find in this delay any reason for criticising relator. On the contrary, it would seem commendable that this board was businesslike in saving to the school district as much interest as possible upon this considerable sum of money.

From the foregoing conclusions we find that the

circuit court was in error in denying relator a writ of mandamus.

The judgment of the circuit court is therefore reversed, without costs.

BROOKE, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

ROBBINS v. VANDERMEIDEN.

ROBBINS v. CAMPMAN.

1. GARNISHMENT—DISCLOSURE—INTERPLEADER—PARTNERSHIP.

Upon the disclosure of a garnishee that a debt owing by him was due to the principal defendant and another, as copartners, doing business under the name and style of Grand Haven Cement Company, which was interpleaded, the court finding that the fund belonged to the partnership, an order should have been entered awarding the fund to the copartnership, and the inquiry should have terminated.

2. PARTNERSHIP—NAMES—STATUTES.

After a copartnership had been summoned in to sustain its claim to the fund which had been garnished, and after the court had made a finding that such fund belonged to it, and not to the principal defendant, the fund could not be awarded to plaintiff on the theory that the copartnership had not properly registered under Act No. 101, Pub. Acts 1907 (2 How. Stat. [2d Ed.] § 2626 *et seq.*), where no affirmative relief was demanded in its behalf and it was not in court voluntarily or as a sutor.

Error to Ottawa; Cross, J. Submitted January 22, 1914. (Docket No. 51.) Decided October 3, 1914.

Garnishment proceedings by Nathaniel Robbins against Henry J. W. Campman in which the Grand Haven Cement Company was interpleaded, to establish its claim to the fund or indebtedness which was shown by the disclosure. Judgment for plaintiff. Defendant garnishee brings error. Reversed.

Coburn & Misner, for appellants.

Walter I. Lillie, for appellee.

BIRD, J. Plaintiff obtained a judgment by default in November, 1911, against the defendant Vandermeiden, for \$463.17. In June, 1912, he caused a writ of garnishment to be issued out of the circuit court and served upon Campman, the garnishee defendant. The garnishee defendant disclosed that he was not indebted to Vandermeiden for the construction of a cement sidewalk, but was indebted for the same to the Grand Haven Cement Company. Following the disclosure both the Grand Haven Cement Company and the garnishee defendant filed motions to dismiss the garnishee proceeding, but both of these motions were denied. Later, upon motion of plaintiff, an order was made interpleading the Grand Haven Cement Company as claimant. The Grand Haven Cement Company was a copartnership composed of the principal defendant and Henry Swafink. There appears to have been a contest, and the court found that the fund garnished did not belong to the principal defendant, but that it did belong to the Grand Haven Cement Company. It was further found by the court that while the fund belonged to the Grand Haven Cement Company, it could not establish its claim thereto by reason of its failure to file with the county clerk the certificate required by Act No. 101 of the Public Acts of 1907 (2 How. Stat. [2d Ed.] § 2626 *et seq.*), relating to copartnerships, and in conse-

quence thereof he awarded the fund which had been paid into court, to the plaintiff.

Complaint is made that the trial court was in error in denying the motion to dismiss the garnishee proceedings, and also in awarding the fund to the plaintiff. Appellant makes the argument that the only way in which the court could justify his order awarding the fund to the plaintiff was to first find that it was owing to the principal defendant. This position is well taken and is supported by both reason and authority. 20 Cyc. p. 983; *Farwell v. Chambers*, 62 Mich. 316 (28 N. W. 859); *Clay Lumber Co. v. Coal Co.*, 174 Mich. 613 (140 N. W. 912).

The inquiry which was instituted by the garnishee proceeding was whether any sum was owing by the garnishee defendant to the principal defendant. The disclosure of the garnishee defendant stated that he was not so indebted, but was indebted to the Grand Haven Cement Company. This ended the inquiry, and was final unless the plaintiff desired to contest the truth of the disclosure of the garnishee defendant that he was not indebted to the principal defendant, or unless he desired to have the Grand Haven Cement Company made a party and contest with it the question as to which was entitled to the fund. The latter course was pursued and the court found the Grand Haven Cement Company was entitled to the fund. When this conclusion was reached it in effect denied plaintiff's claim that he was entitled to the fund, and ended the inquiry. But the court went farther and awarded the fund to plaintiff after he had, by his finding, denied his right to it, and this order is sought to be justified on the ground that the copartnership which was entitled to the fund could not establish that fact by reason of its failure to file the certificate required by law. We think the trial court must have overlooked the fact that the copartnership

was not voluntarily in court. Neither was it in court as plaintiff asking for affirmative relief. It was in court as a respondent and by force of an order of the court requiring it to show cause, touching the ownership of the fund, and for the purpose of enabling the court to determine to whom it belonged.

It would hardly be consistent to compel the copartnership to become a suitor and then deny to it the right of a suitor. The right to enforce their demands in the courts has been denied to delinquent copartnerships under this statute in *Cashin v. Pliter*, 168 Mich. 391 (134 N. W. 482, Ann. Cas. 1913C, 697), but in that case the delinquent copartnership was seeking affirmative relief. In the case before us the garnishee defendant has voluntarily paid money into court which he confesses belongs to the Grand Haven Cement Company. The plaintiff is not entitled to the money, and neither the principal defendant nor the garnishee defendant claims it; therefore it amounts to a voluntary payment by the garnishee defendant to his admitted creditor, the Grand Haven Cement Company. The judgment awarding the fund to the plaintiff will be vacated, and one entered in the trial court in favor of the Grand Haven Cement Company.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, and STEERE, JJ., concurred. MOORE, J., did not sit.

POIRIER v. BARTLETT LUMBER CO.

1. MASTER AND SERVANT — NEGLIGENCE — PERSONAL INJURIES — APPLIANCES.

Where plaintiff and his fellow-servants were employed in raising the supports for a tramway, and the master had provided a derrick to be used in raising the supports, but the workmen used pike poles instead and the timbers slipping from their control fell upon plaintiff, the master was not liable, and a verdict was properly directed for defendant on the ground that, having provided the appropriate appliances and pointed out a safe method of performing the work, the employer had performed his duty.¹

2. SAME—WARNING SERVANT.

Nor was there any room for the claim that the employer was negligent in failing to warn plaintiff of the danger, in the absence of evidence that the defendant or some person in the relation of *alter ego* knew of the workmen doing the work in the manner charged, or that they would be liable to do it in that way.

3. SAME—SAFE PLACE—ASSUMED RISK.

Nor was the defendant liable for failing to provide a safe place to work, where plaintiff claimed he slipped on ice which was covered with snow, and was unable to escape from under the descending timber; accumulations of ice due to normal weather conditions being known to plaintiff and his coemployees, and the danger being obvious.

Error to Chippewa; Fead, J. Submitted June 2, 1914. (Docket No. 2.) Decided October 3, 1914.

Case by Napoleon Poirier against the Bartlett Lumber Company for personal injuries. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

¹ As to the liability for negligence of coservant in failing to use the instrumentalities furnished by the master, see note in 54 L. R. A. 122.

F. T. McDonald, for appellant.

Davidson & Hudson, for appellee.

STONE, J. This is an action on the case, in which the plaintiff seeks to recover damages for a personal injury sustained by him on March 19, 1912, while in the employ of the defendant, and while engaged in assisting to erect or widen a tramway at the sawmill of the defendant. The plaintiff at the time of the injury was about 24 years of age. After being engaged in sailing for some years, he had worked in Canada at carpenter work for about two years before coming to this country, in 1908. He had worked about a year around the Soo at what he termed "heavy work," and had assisted in building a stone crusher plant for the Great Lakes Dredge & Dock Company, which was much the same kind of construction as the tramway upon which he was working when he was injured. He had also worked upon a tramway for McArthur Bros. about two years before the accident here involved.

Plaintiff began to work for the defendant early in November, 1911. He first worked at carpenter work on a house of defendant, and was employed at this work until about December 15, 1911, when it was finished, and he then went to work at the sawmill, doing carpenter work. He worked about two weeks at the mill, assisting in constructing the first tramway. The large timbers used as vertical supports in constructing this first tramway were raised by the use of a derrick, or gin pole. Plaintiff did not have anything to do with the actual raising of these timbers for this first tramway. His work consisted in nailing the cross-pieces on the top. He saw them use the derrick. A Mr. Belleau was in charge of the carpenters building the houses, and directed the work in constructing the second tramway. After two weeks' working at the

mill, plaintiff went back to work on a house, and continued working there until March 16 or 17, 1912. He was then directed by Belleau to go with him to work at the mill on the construction of the second tramway, or extension. He went down and worked with three others and Mr. Belleau. He first started shoveling snow, and worked at this two or three days, receiving instructions from Belleau. The snow was about two feet deep. Plaintiff helped shovel the snow for the next part of the tramway, to lay the block foundations for the widening of this tramway. This was done by shoveling away a couple of feet of snow, which up to this time had not been disturbed. This work was done by plaintiff and three other men. When the work started the ground was somewhat frozen, but not hard. Some days it was soft and some hard, depending upon the weather. It became hard after the first. It had thawed a couple or three days before the plaintiff was injured, and was freezing the day of the injury. Under the snow there were some sawdust, slabs, and sand frozen to some depth. Plaintiff testified that he did not know there was any ice under the snow. Some snow was left on the ground, and it was more or less packed down. About 4 o'clock in the afternoon of the day before plaintiff was injured, the raising of heavy timbers used as upright supports for this widening of the tramway was begun. As a foundation for this tramway, timbers were squared on two sides and laid on the ground, resting on two blocks underneath. The snow was cleared away and holes were dug in the ground for these blocks, until a good place to make them fast was found. There were five men engaged in the raising of these timbers, including the plaintiff and Belleau. The latter was giving instructions, and directing the work.

These timbers were raised by pike poles and by

hand, instead of a derrick or gin pole. Belleau ordered the men to put these timbers up by pike pole and hand, as it was too slow to use the derrick, although a derrick was there and could have been used. There was testimony that raising these timbers by use of a derrick was the customary and safe way. These timbers were from 13 to 18 feet long, 16 inches in diameter, heavy, green, peeled Norway timber, frozen hard, and weighed from 1,200 to 1,500 pounds each. Plaintiff was injured at about 4 o'clock in the afternoon of the second day, by the falling of one of these timbers. The method used in raising these timbers was for the five men, including the plaintiff and Belleau, to lift the timber up and put their shoulders under the back end, and raise it as high as they could from the ground, the other end being held on the timber upon which it was to stand, then place a cross-tree made from two 2x6 timbers under it to hold it up, and then all of the men (except one who would take care of the end which was to rest on the block foundation) would jab their pike poles into the timber and push it into an upright position, when it was nailed to crosspieces. The timber that fell on the plaintiff had been raised in this manner, and was nearly in an upright position, when it turned and fell, rolling off from all the hooks at the same time. As soon as the timber started to fall, the plaintiff attempted to get away. He started to run, but slipped and fell, and the timber, falling on him, injured him seriously.

The plaintiff testified that in attempting to get out of the way of the falling timber he pushed his right foot into the snow for a footing, and slipped on the ice underneath the snow. The plaintiff testified that this was the first time he had ever used a pike pole, that he had never seen timbers put up in that way before, and that he was given no instructions and received no warning that this method of

raising timbers was dangerous, or that the timber was likely to fall. There was testimony that previous to the accident there had been some discussion by the men there employed, as to the desirability of using a derrick instead of the pike poles, and that plaintiff, among others, had discussed the idea of quitting if some change was not made. It was undisputed that the derrick was there, and could have been got ready in a very short time.

At the close of the plaintiff's testimony, the trial court directed a verdict for the defendant upon the grounds that the plaintiff and Mr. Belleau were fellow-servants, engaged in the same line of employment, working under the same master, and together; that there was no claim in the case that Mr. Belleau was not a competent servant, or a competent workman, and the mere fact that he had some little authority over the other four men working upon the same job would not take him out of the same class of fellow-servants; that it appeared also that the defendant had furnished a proper appliance and method for doing this work—had furnished a derrick, which, according to the testimony, was safe and proper—that the derrick was accessible and could have been used by the men while doing this work, but that it was rejected, and the method was used by which the plaintiff was injured.

The court also charged the jury as follows:

“In such a case as that the master is not liable for any negligence when he furnishes the proper appliances and proper tools and has pointed out the safe method for those who work at that employment, and if they do not follow the method, but use one of their own, the employer is not liable for negligence.

“It is also claimed that the employer was negligent in not warning the plaintiff. There appears to be no evidence in this case that the defendant, or any person working for the defendant, who would be in the

position of a vice-principal, knew that the plaintiff or his associates were doing the work in the manner in which they were doing it, nor that they would be liable to do it in that way. There is nothing to connect the defendant at all with the improper method or unsafe way in which this work was being done, and it would not be the duty of the employer to warn the plaintiff against a practice which was safe, and which the employer, according to the testimony, would have reason to believe was being followed, and, no knowledge having been brought to the employer, or defendant that the practice followed was unsafe, he could not be under any obligations to warn the plaintiff.

"Now, it is also claimed that the defendant has been negligent in not providing a safe place in which to work. It does not appear that this place became unsafe, if it was unsafe, by reason of any want of care on the part of the defendant. The particular act of negligence claimed in this respect is the matter of the accumulation of ice. But it appears that this particular place had been gone over by the plaintiff, and by his fellow-servants; that any condition existing there must have been known to them, or at least it must have been as well known to them as it was to the defendant. The defendant is not a guarantor of climatic conditions, nor the particular condition of any place which may confront workmen on temporary jobs. If this were a permanent employment, his accountability would be held in a more strict manner than where it is merely a temporary job, outside work, and the particular danger, if there was any danger, arises from climatic conditions. It does not appear, gentlemen, from the undisputed testimony in this case that the defendant has been negligent in any of the respects mentioned in the declaration. Aside from that, it might also be mentioned that the plaintiff is a man of mature years; that he has had considerable experience as a carpenter; that some of this has been on rough construction work such as this particular work, or work similar to it; and that he is a man of at least ordinary intelligence, and, as the methods used upon this occasion have been said to be dangerous, it must be apparent that such danger would be obvious to any man of ordinary intelligence, and he

would be deemed to have assumed the risk of such danger by his contract of employment."

A verdict and judgment for the defendant having been entered, the plaintiff has brought the case here upon writ of error, and error is assigned upon the rulings of the court in admitting certain testimony, and also upon the charge of the court, above set forth.

An examination of the record satisfies us that the trial court did not commit any error in the admission of testimony, and the charge of the court so clearly stated the rules of law that are controlling in the case that a discussion of them is not necessary. The law of the case has been so often stated by us that a reference to the cases is unnecessary.

We find no error in the record, and the judgment of the circuit court is affirmed.

MCALVAY, C. J., and BROOKE, KUHN, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

NAY v. DICKINSON.

1. PLEADING—FALSE IMPRISONMENT—ASSAULT AND BATTERY—DECLARATION—DIRECTED VERDICT.

On the trial of an action for false imprisonment and assault and battery, plaintiff, who charged that defendant arrested her without a warrant and that he employed more force than was necessary, was properly refused the right to recover for excessive force in making the arrest, not having alleged that, if the arrest was lawful, the defendant used more force than was necessary.

2. ASSAULT AND BATTERY—FALSE IMPRISONMENT—ARREST.

Where defendant attempted to pass over plaintiff's land to reach a private gravel pit, claiming that he was going to the property of a municipal corporation which had a license to cross the land of plaintiff, who disputed his passage and assaulted defendant, and he thereupon seized plaintiff, threw her into a vehicle and carried her before a justice of the peace, and where she pleaded guilty and was fined, defendant was excused if she intelligently confessed herself guilty of the offense with which he charged her; but if she did not intelligently plead to the complaint and had tried to prevent a trespass by defendant upon her property, using only necessary force, she was entitled to recover.

Error to Newaygo; Barton, J. Submitted June 2, 1914. (Docket No. 3.) Decided October 3, 1914.

Case by Harriet Nay against George Dickinson for false imprisonment and assault and battery. Judgment for defendant on a directed verdict. Plaintiff brings error. Reversed.

Dunham & Dunham, for appellant.

E. L. Brooks (*A. B. Cogger*, of counsel), for appellee.

OSTRANDER, J. The city of Fremont, Mich., purchased land in which was a deposit of gravel. Access to the land was over other premises of the vendors, and was secured to the city by a license, perhaps by the deed of conveyance. In the lane or avenue used by the city is a gate. Defendant owns land adjoining that acquired by the city, and on his land there is a deposit of gravel. In time defendant came to hold the offices of chief of police and highway commissioner in the city. On August 16, 1912, he and another, with a wagon drawn by two horses, were proceeding to or towards the gravel pit when he found the gate locked

and guarded by plaintiff, the wife of the city's vendor, and perhaps herself a joint owner of some of the land over which defendant was proceeding. She disputed defendant's passage, but was set aside, the lock broken, the gate opened, and the men proceeded to load and draw away gravel. Plaintiff went to her house, got a chain, without a lock, with which she again fastened the gate, and, arming herself with a club, was found by defendant, returning for another load of gravel, again guarding the gate. She says, among other things:

"After I told Mr. Dickinson he could not go through there, he attempted to take the chain from the gate. He put his hands through the fence and around the post, and I was striking the post, and told him to keep his hands off. I was striking the post all the time, and told him to keep his hands away from there. Mr. Dickinson reached through and got hold of the chain where I was striking, and I struck him on the hands once."

She knew the defendant was street commissioner. Unable to unfasten the gate from the side he was on, defendant climbed the fence and held plaintiff while the other man unfastened the gate, drove through, turned the team about, and, assisting each other, they loaded plaintiff into the wagon and carried her before a justice of the peace. There is testimony tending to prove that before loading her into the wagon defendant placed her under arrest. The prosecuting attorney was present or was called in. A complaint charging plaintiff with an assault and battery upon defendant was made, a warrant was issued and delivered to defendant for service, who made a return, and plaintiff was, according to the record, convicted upon her plea of guilty, and ordered to pay a fine of \$5 or be committed to the county jail for ten days. The judgment was not appealed from; plaintiff's husband later paying her fine.

Plaintiff alleges in her declaration an assault and battery committed by defendant upon her, a false imprisonment, and, in a third count, abandoned at the trial, a malicious prosecution. By direction the jury returned a verdict of no cause of action, upon which judgment was entered. Plaintiff (appellant) says in the brief that upon the trial there were two issues—one, was the arrest of plaintiff by the defendant lawful and justified? the other, if the arrest was lawful, then in making such arrest, did defendant use more force than was necessary?—and that concerning each there was disputed testimony and a question for the jury. The learned trial judge ruled, and correctly, that the declaration nowhere alleges an excessive use of force in making the arrest, and that no such issue was involved.

Eliminating argument addressed to this proposition, the case turned, and turns, upon the arrest and its lawfulness. Counsel do not greatly disagree. It is admitted that if defendant was on his way to take gravel from the city property for city use plaintiff had no right to interfere with him. It is conceded, as I understand the record, that if defendant was on his way to take gravel from his own pit he was a trespasser. The plaintiff justified, or excused, her attitude and action by claiming that defendant was using, or was seeking to use, her premises, and the city's license to conveniently remove gravel from his own land. The defendant, by his plea, justifies his action as necessary to protect himself from plaintiff's assaults while exercising the right of the city to go upon the land, saying that plaintiff had upon a previous occasion been arrested, charged with threatening defendant with great bodily harm and threatening to shoot him. Defendant gave notice, too, that he was at the time an officer having authority to arrest persons committing a breach of the peace, that plain-

tiff assaulted him, and that her conduct warranted him in making the arrest, and that the detention of plaintiff before her arraignment was necessary and justifiable.

Plaintiff did not ask defendant what his purpose was. She assumed—she says she wanted a row—that he was on his way to take gravel from his own land. She gave testimony tending to prove that the load of gravel first taken away was drawn from defendant's land and pit. Other testimony tends to prove that during the summer considerable material had been drawn from defendant's pit for city use, and that plaintiff's husband had forbidden use of his land for that purpose. In short, it is now plaintiff's contention that she was defending her own and husband's premises against a trespasser, and was justified in what she did. Such a contention might have raised the controlling issue in the criminal proceeding if it had been asserted upon the trial thereof. She testified she did not know with what offense she was charged in that proceeding, had no trial, did not know she had been convicted or sentenced.

I cannot avoid the conclusion that the jury should have been allowed to determine whether defendant's errand was to his own or the city sand pit, whether he was, in fact, a trespasser, and whether plaintiff intelligently confessed herself guilty of an assault and battery upon defendant. The whole affair is deplorable. But parties are here standing on their strict legal rights, and these, I think, cannot be determined, on this record, as matter of law. If plaintiff intelligently pleaded guilty to the charge which defendant made against her, she ought to be held bound by her plea and the defendant excused. If she did not, and if she was in fact attempting to prevent a trespass, using no more force than was necessary, she was jus-

tified, and defendant was not, by anything now appearing, justified in his course.

The judgment is reversed, and a new trial granted.

MCALVAY, C. J., and BROOKE, KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

CHATFIELD v. SINTZ-WALLIN CO.

1. FRAUD—PLEADING—STOCK—CORPORATIONS.

Where plaintiff's declaration alleged that she offered in October, 1909, to purchase stock of defendant corporation, which in the following March accepted her proposal, issuing certificates of stock as ordered, but in the meantime a reorganization took place and defendants knew that plaintiff expected and offered to subscribe for treasury stock, that shares of stock actually forwarded to plaintiff were not treasury stock but belonged to one of the officers of the company and the purchase price went to him instead of the corporation, that by the second or later plan of reorganization the corporate stock was rendered valueless, and that the financial condition of the defendant company had completely altered at that time, averring the knowledge and participation of the individual defendants, officers and directors of defendant, in the wrongful acts stated, plaintiff sufficiently set forth a cause of action for fraud and would be entitled to recover if the evidence substantiated the allegations of her pleading.¹

2. SAME—RESCISSION—SALES.

The fact that she rescinded her contract of purchase by tendering back to the corporation the capital stock which

¹ As to the rescission of subscription to stock for fraud and misrepresentation, see note in 33 L. R. A. 721.

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was delivered to her, demanding back the purchase price, did not preclude plaintiff from bringing an action against the individual defendants.

3. SAME—EVIDENCE.

Conflicting evidence raising the issue whether or not plaintiff's husband was her agent, and had knowledge of the facts, which plaintiff claimed she did not know, was properly submitted to the consideration of the jury.

Error to Kent; Perkins, J. Submitted June 3, 1914. (Docket No. 14.) Decided October 3, 1914. Rehearing denied December 19, 1914.

Case by Nellie C. Chatfield against the Sintz-Wallin Company and others for the recovery back of money paid for stock of said corporation. Judgment for plaintiff. Defendants bring error. Affirmed.

Norris, McPherson & Harrington (Oscar E. Waer, of counsel), for appellants.

Ellis & Ellis, for appellee.

OSTRANDER, J. In the declaration, in the special count, defendants are charged with issuing and circulating a false, fraudulent, and misleading prospectus with respect to the solvency of defendant corporation, the profitableness of its business, and the ability to pay a large dividend on its preferred stock, representing that there was for sale treasury preferred stock of the corporation which, if sold, would increase its issue of preferred stock; the intent and purpose being to induce plaintiff to purchase the stock of defendant corporation and get five hundred dollars of her money. The individual defendants are described as officers and stockholders of defendant corporation, and are charged with conspiring and agreeing together to cheat and defraud plaintiff and to turn over to her worthless stock of the defendant corporation. By means of the false representations and the

conspiracy and combination, plaintiff was deceived and induced to pay over to defendant corporation \$500 for 5 shares of the treasury preferred stock of the corporation, which purported to be worth, upon the certificate issued therefor, \$100 a share. In the same count it is alleged that on or about October 15, 1909, relying upon the said fraudulent representations, plaintiff subscribed for 5 shares of the treasury preferred capital stock of the defendant corporation, and on or about April 11, 1910, paid to the defendant corporation \$500, and received from it, in exchange, certificates for five and eight-tenths shares of stock, purporting to be treasury preferred capital stock of said corporation—

“Having been informed by her husband, Charles B. Chatfield, who had also subscribed for and purchased stock of the said company, that said company had decided to issue said stock as paying a 7 per cent. instead of an 8 per cent. dividend, and that he, her said husband, had arranged with said company to issue to this plaintiff 5 $\frac{8}{10}$ shares of said stock drawing a 7 per cent. dividend, instead and in place of 5 shares of said stock drawing an 8 per cent. dividend, so that this plaintiff might have her said \$500 so invested in said stock, drawing an 8 per cent. dividend.”

It is alleged that when the false representations were made and when the certificate was delivered the stock was worth nothing. After the false representations were made, and before the money was paid and the certificates of stock delivered, but unknown to plaintiff, the defendant corporation, being bankrupt and insolvent, issued its preferred stock to pay its debts, and made a composition with creditors, or some of them, paying them one-half in preferred stock, one-fourth in cash, and one-fourth in notes. Various details of the alleged bankruptcy and various dealings are set out. It is finally alleged that the stock delivered to the plaintiff was not treasury stock of the defendant corporation and that her money did not go

into the corporation treasury. Instead, the money went to defendant Claude Sintz, and it was he, by the aid and connivance of the other defendants, who sold to plaintiff some of the capital stock of the defendant corporation owned by himself, and used the money paid by plaintiff to pay a mortgage for the payment of which he was liable. After learning that she had been defrauded, the plaintiff tendered her stock to the defendant corporation, to the president thereof, demanding that her money be returned to her; the demand being refused. The defendant has never paid any interest or dividend on the said stock nor been able to do so. Plaintiff has been deprived of her money and the use thereof, to her damage \$1,000. The count is concluded by pleading the statute (3 Comp. Laws, §§ 10421, 10422), an allegation of the promise of defendants to pay her \$1,000 for her damages and injuries, and the final refusal of defendants to do so. The common counts in assumpsit are added. The plea for all of the defendants was the general issue.

At the close of plaintiff's testimony counsel for defendants asked for a peremptory instruction in their favor, assigning as reasons:

"(1) That the evidence fails to sustain in any degree the allegations of fraud made in the declaration.

"(2) That under the undisputed evidence the prospectus which is claimed to contain all fraudulent allegations or statements upon which the cause of action is based is not shown to have been authorized by the corporation, and is not signed by any one of the individual defendants.

"(3) That the prospectus upon which the cause of action is based is the prospectus offering for sale to the public treasury stock of a corporation, while the evidence—the undisputed evidence of the plaintiff—is that she purchased the individual stock of another, and not treasury stock of the corporation.

"(4) That there is no evidence in the case upon

which the jury can assess damages; the rule of damages being that in such a case the plaintiff shall recover the difference between the real value of the stock when it was purchased and the represented value of the purchase price paid, there being no evidence here from which a jury can determine what was the real value of the stock at the time of the purchase.

"(5) That, in so far as the action is based upon a rescission, it is only shown here that tender was made back to the corporation which was not the vendor of the stock and that no tender was made to the defendant, Claude Sintz, who was the vendor of the stock, so that no rescission was made."

Some discussion took place, and in the course of it the record shows the following:

"At this point, plaintiff's evidence having all been taken and plaintiff having rested, counsel for plaintiff, without objection upon the part of defendants, asked to amend the declaration in this case, and thereupon the court stated:

"I am very firmly convinced that the declaration would cover the point as suggested here, and the only remaining point I can see is the liability as to these defendants."

What amendment was desired is not clear, none was made, and no formal amendment was proposed. Before the concluding arguments were made, counsel for defendants said to the court, among other things:

"It is my understanding that the case will be submitted to them on the theory that the truth or falsity of that prospectus is not bound in the suit. If I am right as to that it will simplify the argument; otherwise another line of argument will be necessary."

The reference was to the prospectus of October, 1909, which plaintiff claimed to have read and relied upon. In response the court said:

"I think it is perfectly clear to my mind, from all that has been said, that, as far as the prospectus of 1909 is concerned, it is immaterial excepting so far as it relates to the source from which the stock which

was to be issued was to come. This case must rest upon another and a different proposition, if it goes to the jury at all. As I said the other day, the prospectus of 1909 was unsigned, and there is nothing in writing signed by those issuing it which would comply with our statutes of fraud under the repeated decisions of our court, even though the representations should be believed to be false by the jury and the plaintiff induced thereby to take this stock; still under the law there can be no recovery as against the defendant, causing it to be issued or circulated for the reasons stated. But back of that is the other proposition which I believe is sufficiently set forth in the declaration. The prospectus offered to sell stock of the corporation—treasury stock—and set forth a certain scheme of reorganization. The plaintiff ordered five shares of stock or subscribed for five shares of stock upon the representation contained in this prospectus. Later the plan of organization was changed, and changed materially, in the prospectus which was issued in February, 1910. The question is as to whether the plaintiff before she paid her money and received the stock was advised as to this change and knew about it, and consented to it, and paid her money knowing the facts about the change; secondly, as to whether the defendants jointly and severally, acting in behalf of the company as directors, at the meeting adopted and confirmed this prospectus of 1909, and in so far as any subscriptions for stock had been received under it, and knowingly and wilfully permitted the plaintiff, without her knowledge, to pay her money under the changed conditions and receive stock under a belief that it was treasury stock, when it was not. Whether they knowingly and wilfully permitted this to be done, that, of course, must be determined by the records and what the parties said and did. If there was no ratification or confirmation or adoption by reference or otherwise to this prospectus of 1909 by the act of the corporation, through its directors, and if the directors did not knowingly and wilfully permit the plaintiff to pay her money in ignorance of the real fact, there can be no recovery. But if they did permit her to pay her money under a mistaken apprehension of what the facts were, she

can recover. I understand that it is claimed that this changes the cause of action; that the declaration taken as a whole is based upon a different theory, viz., the theory of the falsity of the statements contained in the prospectus of 1909. I think perhaps that is true, taking the declaration as a whole that that was the theory of the plaintiff, but, at the same time, the declaration alleges the subsequent proceedings, claims that the plaintiff subscribed for treasury stock and received private stock from Claude Sintz instead, and the plan of organization was changed without her knowledge, and all in all it seems to me that there is sufficient in the declaration to justify the submission of the single question to the jury, and so I repeat the question to be argued to this jury, and as I will charge them when the time comes, if I am not charging them now, will be that these conditions jointly and severally and as officers of this corporation acting for the corporation at that time, knowingly and wilfully so acted as to lead the plaintiff to believe and understand that she was receiving treasury stock of this corporation, and knowingly and wilfully led her to believe and understand that the condition of the company at the time she paid her money and the proposed organization of the company was as stated in the prospectus of 1909. Now, that is as clear as I can state it, gentlemen, generally, and you may confine your arguments to that on both sides."

In substance and effect the issue finally submitted to the jury is here stated, and a verdict for plaintiff was returned against all of the defendants, the amount of which is, evidently, the purchase price of the stock and interest. Judgment was entered on the verdict. A motion for a new trial was refused, and errors were assigned upon exceptions taken during the trial and upon refusals to charge, the charge as given, and the refusal of a new trial. Under suitable headings those now relied upon are argued in the briefs and were argued orally.

It is contended:

"(1) Plaintiff's action for a rescission of her contract could be brought only against the corporation.

"(2) The court should have instructed the jury that, under plaintiff's own showing, she constituted her husband her agent and was bound by knowledge obtained by him.

"(3) There was a fatal variance between the pleadings and the proofs and the theory upon which the case was submitted to the jury.

"(4) The admission of evidence relative to the fraudulent character of the prospectus of October, 1909, was prejudicial, and a new trial should have been granted.

"(5) There was no evidence to sustain the allegations of fraud.

"(6) The court erred in his rulings on the admission of certain documents and evidence.

"(7) Plaintiff's counsel made improper remarks to the jury.

"(8) The court erred in its refusal to instruct and in its instructions to the jury."

These contentions must be considered in connection with the issue upon which the case was made finally to turn. If that issue is not within the pleadings, then, necessarily, error was committed. If the plaintiff's declaration, however inartificially drawn, fairly presented the issue which was submitted, then most of the contentions of the appellants are unimportant.

The testimony for the plaintiff supports the following conclusions: Her proposal to buy stock was made to the corporation, was accepted by the corporation, by its officers, and certificates of stock apparently issued by the corporation to her were delivered to her and payment therefor was made by her to the corporation. Her proposal was made in reliance upon a paper—prospectus—not signed by any one, but bearing date in October, 1909. She made her proposal, or subscription, in writing, in October, 1909. It was not then accepted. In March, 1910, a plan of reorganization of defendant company which differed

essentially from the one suggested or proposed in October, 1909, was adopted. Afterwards certificates of stock, as if issued in reply to and acceptance of plaintiff's proposal to buy stock, were delivered to plaintiff's husband, for her, and she paid for it by her check, payable to the company. When the stock was issued to her, the officers of the defendant company knew that plaintiff's proposal, or subscription, was made in reliance upon the plan of reorganization proposed in October, 1909. They knew it was a subscription for treasury stock. By their action she received, not treasury stock, but stock belonging to defendant Claude Sintz, and Sintz, and not the defendant company, got the money on plaintiff's check. Plaintiff then knew nothing about the new plan for reorganizing the corporation, and supposed that her stock was, in fact, treasury stock for which she had paid the defendant company. The financial condition of the company was not the same in March, 1910, as it was in October, 1909. The plan of reorganization adopted in March, 1910, was essentially different from the one proposed in October, 1909. It is to be presumed that one who would be willing to subscribe for stock under the first plan would not be likely to do so under the second plan; the condition of the defendant corporation being known to him. The stock is, in fact, of no value.

These conclusions correspond with allegations found in the declaration. Such allegations, standing alone, state a cause of action against the persons who took part in depriving plaintiff of her money. All of the individual defendants knew that plaintiff was not receiving the thing she sought to purchase, and all of them, innocently or otherwise, were parties to the proceedings by which the stock she received was given to her and the money which she paid was lost to her. They aided the defendant Claude Sintz in disposing

of some of his stock and in securing money intended by plaintiff for the corporation treasury.

It is true it is alleged and is proven that plaintiff tendered her certificates of stock to the corporation and demanded the amount she had paid for them. But she brought her action for the fraud of all of the defendants—at least the declaration is sufficient in form for this purpose—and no good reason is perceived for denying her relief because her attitude in tendering the certificates was one of rescission. No one appears to have been surprised at the course taken upon the trial or to have been denied the right to present such testimony as was available touching the issue submitted to the jury. Testimony affecting issues which were withdrawn from the jury was not, in view of the uncontradicted evidence that plaintiff did not receive treasury stock and that her money did not go into the treasury of the company, prejudicial to defendants. The court laid down no rule of damages for the jury. It is stated in the charge of the court that the plaintiff demanded of the defendant corporation when she tendered her certificates the money she had paid and interest. As has been stated, a verdict was returned for the price paid and interest, a sum which, in view of the testimony, is a proper award. Whether plaintiff's husband was her agent, had knowledge which she did not possess, and concluded her by what he knew, were questions submitted to the jury. It is doubtful if the testimony, in any view of it, sustains the contention of appellants in this behalf.

Upon a review of the entire case, no reversible error is made out, and the judgment is therefore affirmed.

MCALVAY, C. J., and BROOKE, KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

In re IVES' ESTATE.JOHNSON *v.* SKINNER.

1. WILLS—CONSTRUCTION—INTENT.

It is elementary that the primary object in interpreting a will is to ascertain, if possible, the intent which the testator had in mind, and to give effect to it. The whole will should be construed together, so as to give effect, if possible, without violating well-settled rules of law, to every part or provision of it, provided such an effect can be given consistently with the general intention of the testator as ascertained from the whole will.

2. SAME—CODICIL—INTERPRETATION.

The codicil is to be construed with the will as one instrument.

3. SAME—EVIDENCE—PRESUMPTIONS.

There is a presumption, also, that testator intended to dispose of his entire estate by his will and not to die intestate either as to the whole or any part thereof, and the will should be so construed unless the presumption is clearly rebutted by the provisions of the will or by evidence to the contrary.

4. SAME—ESTATES OF DECEDENTS.

Where the testatrix disposed of her property by certain bequests and added a residuary clause stating that she gave all the rest, residue and remainder of her estate, both real and personal, and wherever situated to her three brothers and sisters, an undivided third to each, and one of them later died, to whom the testatrix gave \$10,000 by a codicil to the will, and who was mentioned in the original draft of the instrument in a clause which stated that she was sufficiently provided for, and where family history and undisputed circumstances pointed in the same direction, the adopted daughter was not entitled to any share of the residue of the property.

5. SAME — RULES OF INTERPRETATION — DEATH OF BENEFICIARY — EFFECT.

When it is evident from the whole tenor of the will that

testator, in making the gift of an aggregate sum to certain relations, intended to provide for them collectively as a class, the designation of each individual by name, or the use of distributive words, or words denoting equality, will not be held to make the gift operate as a gift of a separate interest to each individual named, which would lapse by his death before the testator.

Error to Kent; McDonald, J. Submitted June 10, 1914. (Docket No. 59.) Decided October 3, 1914.

The probate court for the county of Kent having entered an order assigning the residue of the estate of Marietta Ives, deceased, Helen Ives Johnson, claiming one-third of such residue, appealed to the circuit court. Judgment was entered in her favor reversing the decree of the probate court and Mary Skinner, as executrix of said estate, and Dwight Skinner bring error. Reversed.

Travis, Merrick & Warner and Jewell & Ewing, for appellants.

Wilson & Johnson, for appellee.

STONE, J. The appellants seek, by writ of error, the reversal of an order of the circuit court which vacated an order of the probate court of Kent county, assigning the residue of the estate of Marietta Ives, deceased, to Wesley Skinner and Dwight Skinner, and which order of the circuit court directed said probate court to enter an order permitting Helen Ives Johnson to share equally in the residue of said estate.

Marietta Ives, a widow, died at the age of about 60 years, upon March 13, 1912, without having had issue. She was the youngest of four brothers and sisters, all of whom lived in Grand Rapids, and none of whom ever had any children. Mrs. Ives was survived by her two brothers, Wesley and Dwight Skinner, but her sister, Hattie Butterfield, died shortly be-

fore her, on January 1, 1912, a widow. Mrs. Ives was also survived by Helen Ives Johnson, an adopted daughter, by adoption proceedings taken by Mrs. Ives and her deceased husband in 1890. Mrs. Ives left a will dated September 12, 1901, and a codicil thereto dated January 24, 1908, both of which were duly admitted to probate. The will, after providing for the payment of debts, and funeral expenses, for the erection of a certain monument and caring for certain burial places, and after a specific bequest of \$1,000 to a cousin of testatrix, provided further as follows:

"Fifth. After the payment of the above-named debts and expenses and legacies, I give, devise and bequeath all the rest, residue and remainder of my estate, both real and personal, and wherever situated, to my sister, Hattie Butterfield, and my brothers, Wesley and Dwight Skinner; to each an equal undivided one-third.

"Sixth. I have not forgotten my adopted daughter, Helen H. Ives, but consider that she is sufficiently provided for already.

"Seventh. I appoint Charles E. Ward to be the executor of this my last will and testament."

Mr. Ward acted as attorney for testatrix in the preparation of the will, and was also one of the attesting witnesses thereof.

The codicil, omitting the formal parts thereof, contained only the following provision:

"Four and one-half: I give, devise and bequeath unto my adopted daughter, Helen H. Ives, the sum of ten thousand dollars, to be paid out of my estate at the time of the final settlement thereof: Provided, however, that this bequest is made upon the express condition that my said daughter shall not contest or oppose the probate and administration of my said will, or procure any person to contest the same, or aid in any manner in contesting said will, or in preventing the same being probated and carried out. And in case of any such act or acts on the part of my said

adopted daughter, then the provision above mentioned in her behalf shall be null and void, and the sum of ten thousand dollars above mentioned shall be distributed according to the provision of said will as it existed prior to the making of this codicil."

Mr. Ward also acted as attorney for testatrix in the preparation of the codicil, and was also one of the attesting witnesses thereof.

The specific legacy of \$10,000 to Helen H. Ives, now Helen Ives Johnson, was paid, and the residue of the estate of the deceased consisted of property, most of which was personalty, valued at upwards of \$50,000.

In the probate court Helen Ives Johnson, the adopted daughter of testatrix mentioned in the will and codicil, made claim to one-third of the residue of the estate, on the ground that the gift of one-third thereof to Hattie Butterfield, in the will, lapsed upon her death without issue prior to the death of testatrix, and therefore passed to the claimant, sole kin at law of deceased, as intestate property. This claim the probate court disallowed, holding that the interest of Helen Ives Johnson in the estate of deceased was limited to the specific legacy of \$10,000, which had been paid, and further holding that Wesley and Dwight Skinner, sole surviving residuary legatees, were entitled to take all of the residue under the will.

From the order thus assigning the residue, claimant appealed to the circuit court, where, upon a trial without a jury, the order appealed from was vacated as above stated. On the trial at the circuit the court admitted, over claimant's objection, but later struck from the record, certain testimony of Charles E. Ward, who prepared the will and codicil, which testimony was offered in behalf of Wesley and Dwight Skinner, and consisted of statements made by the testatrix to the witness prior to the preparation and

execution of the will and codicil, descriptive of her feelings towards the adopted daughter, and her desires in regard to the provisions to be incorporated in her will and codicil. No other facts material to the controversy were disputed at the trial. To explain the record it perhaps should be stated that since the trial of the case Wesley Skinner has died testate, in the said county, and that the said probate court has jurisdiction over all the property of said Wesley Skinner, deceased, including his interest in the estate of said Marietta Ives, deceased.

By appropriate assignments of error, appellants raise two questions which are stated by them in the form of the following propositions asserted by them:

(1) That the residuary clause of the will of Marietta Ives, interpreted in the light of the whole will and codicil, effectually expresses an intent to give all of the residue to the sister and brothers of testatrix, or to such of them as should survive her.

(2) That the trial court erred in excluding from consideration extrinsic evidence tending to show circumstances surrounding the making of the will and codicil, which were necessary to a correct understanding of the terms employed.

We have been greatly aided in this case by the able and exhaustive briefs of counsel upon both sides, as well as by oral arguments. More than three score cases have been cited by counsel having more or less bearing upon the questions involved. We cannot here attempt to review them in detail. An examination of the authorities cited has brought us to the conclusion that the case should be disposed of by the application of a few familiar rules and principles of testamentary construction.

It is elementary that the primary object in interpreting a will is to ascertain, if possible, the intent which the testator had in mind, and to give effect to

it. *Rock River Paper Mill Co. v. Fisk*, 47 Mich. 212-221 (10 N. W. 344); *Barnes v. Marshall*, 102 Mich. 248-255 (60 N. W. 468); *Wheeler v. Wood*, 104 Mich. 414-417 (62 N. W. 577); *Gregory v. Tompkins*, 132 Mich. 205 (93 N. W. 245).

Our own cases are numerous to the effect that the whole will should be construed together, so as to give effect, if possible, without violating well-settled rules of law, to every part or provision of it, provided such an effect can be given consistently with the general intention of the testator as ascertained from the whole will. 40 Cyc. p. 1408; *Tewksbury v. French*, 44 Mich. 100-102 (6 N. W. 218), and cases cited; *Des Grand Champ v. Duflo*, 169 Mich. 104, 105 (135 N. W. 98), and cases cited. Many more of our own cases might be cited to the same effect.

Another rule is that the will and codicil are to be construed together as one instrument. *Dexter v. Gordon*, 136 Mich. 235-239 (98 N. W. 1016); *Sondheim v. Fechenbach*, 137 Mich. 384 (100 N. W. 586).

The presumption is that a testator intended to dispose of his entire estate, and not to die intestate either as to the whole or any part thereof, and the will should be so construed, unless the presumption is clearly rebutted by the provisions of the will or by the evidence to the contrary. 40 Cyc. p. 1409; *Toms v. Williams*, 41 Mich. 552-565 (2 N. W. 814); *Des Grand Champ v. Duflo*, *supra*.

In the instant case we have not only the presumption to aid us, but we have also the express language of the testatrix, that she intended to give the rest, residue, and remainder of her estate to her sister and brothers.

In *Toms v. Williams*, *supra*, Chief Justice CAMPBELL said:

"It has always been a primary rule of testamentary construction to look to substance rather than form.

Our statutes favor this rule, and also require all intendments to be made to prevent a partial intestacy."

An examination of the will and codicil satisfies us that it was the intention of the testatrix to give to her adopted daughter only the sum of \$10,000 upon the terms stated, and to give to her brothers and sister the residue of her property. Not only do the instruments when read together indicate this, but the family history and undisputed circumstances all point in the same direction. The fact that she did not change her will after the death of her sister, Mrs. Butterfield, is a significant circumstance.

We are of opinion that the following claim of appellants is supported by the weight of authority:

"Where it is evident from the whole tenor of the will that testator, in making the gift of an aggregate sum to certain relatives, intended to provide for them collectively as a class, the designation of each individual by name, or the use of distributive words, or words denoting equality, will not be held to make the gift operate as a gift of a separate interest to each individual named, which would lapse by his death before the testator."

See 40 Cyc. p. 1930, and cases cited; *Jackson v. Roberts*, 14 Gray (Mass.), 546; *Stedman v. Priest*, 103 Mass. 293; *Meserve v. Haak*, 191 Mass. 220 (77 N. E. 377); *Smith v. Haynes*, 202 Mass. 531 (89 N. E. 158); *Hoppock v. Tucker*, 59 N. Y. 202; *Roosevelt v. Porter*, 36 Misc. Rep. 441 (73 N. Y. Supp. 800); *Mann v. Hyde*, 71 Mich. 278 (39 N. W. 78); *Bolles v. Smith*, 39 Conn. 217.

At the argument our attention was called by counsel for appellee to *Strong v. Smith*, 84 Mich. 567 (48 N. W. 183). We do not think that that case modifies the rule we are considering, but deals with a case falling within the terms of the statute there cited,

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which has no application here, as Mrs. Butterfield left no issue. We are of the opinion that, in the disposition of the residue of her property, the testatrix was dealing with a class, under which the survivors take the share of the one who died without issue.

We are not unmindful of the many cases cited by counsel for appellee from other States. The circumstances surrounding the instant case were peculiar and exceptional. Not only was the heir at law an adopted daughter who had in the original will been entirely ignored as a legatee, and when provision was made for her in the codicil it was for a specific sum, upon certain terms therein indicated, but the residuary legatees were the only immediate blood relatives of the testatrix. They constituted a natural and complete class, namely, brothers and sister of the testatrix, and were so referred to in the will.

We recognize the general rule contended for by appellee that, where property is given to several persons by name, to be equally divided between them, they take as tenants in common, and not as joint tenants, or as a class. But the authorities hold, we think, that this rule yields to a different construction when it plainly appears from the will that it was the intention of the testator that the survivors should take the whole. We think that this is such a case, and that for the reasons stated the trial court erred in its conclusion in reversing the action of the probate court.

In our opinion, it is not necessary to go outside of the will and the conceded facts to reach this conclusion, and that it is unnecessary to consider the admissibility of the testimony of Charles E. Ward, as without such testimony the same result should be reached. In other words, we are of opinion that the intent of Mrs. Ives plainly expressed in her will and codicil thereto, and clearly indicated by the general

tenor and scope thereof, was to give \$10,000 only to her adopted daughter, and to give the residue to those of her brothers and sister who might survive her.

The judgment of the circuit court is therefore reversed, and a new trial is granted, with costs to appellants against appellee.

MCALVAY, C. J., and BROOKE, KUHN, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

In re McLAUGHLIN'S ESTATE.

HINCKLEY *v.* McLAUGHLIN.

BILLS AND NOTES—ESTATES OF DECEDENTS—EVIDENCE.

Upon the trial of an action in the nature of a claim against the estate of a decedent based on a non-negotiable instrument in writing whereby decedent agreed to pay claimant \$10,000 on or before ten years from its date, reciting as consideration that it was given for a half interest of claimant in a patent coaster brake, and in a corporation organized to manufacture it, evidence of a sufficient consideration was not necessary to establish a case: claimant could recover without proof of an assignment or conveyance of the half interest in the patent, the instrument importing consideration: it was for defendant to show want of consideration.

MOORE, BROOKE, and STONE, JJ., concurring on the ground that the evidence tended to prove a sufficient consideration.

Error to Jackson; Parkinson, J. Submitted June 19, 1912. (Docket No. 58.) Decided December 17,

1912. Rehearing granted June 2, 1913. Former opinion affirmed March 27, 1914. Second rehearing granted. Previous opinions overruled and new trial granted March 17, 1915.

Frederick P. Hinckley presented a claim against the estate of Miar McLaughlin, deceased, which was contested by Emma McLaughlin, administratrix, and disallowed by the commissioners on claims. On appeal by claimant to the circuit court, a verdict was directed for defendant. Claimant brings error. Reversed.

Price & Whiting, for appellant.

Wilson & Cobb, for appellee.

MOORE, C. J. The claimant presented the following as a claim against the estate of Dr. McLaughlin:

"Estate of Dr. Miar McLaughlin, Deceased.

"To Fred P. Hinckley, Dr.

"1908.

"Aug. 10.

"Below is a copy of the note and agreement given me by Dr. Miar McLaughlin on which there is now due me the sum of \$11,647.40.

"[Copy.]

"JACKSON, MICH., April 12, 1902.

"I Dr. M. McLaughlin. Agree to pay F. P. Hinckley. On or before the twelve day of April 1912 the sum of \$10,000. Ten Thousand Dollars At three per cent. interest. The interest to be paid on or before April 12 of each year. For his undivided half interest in the Automic Coaster Brake. Co. Located at 102 East Washington St. Jackson Mich And all Patents pertaining to Coaster Brakes up to this Day that has been applied for and will be applied for in United States And all Foreign Countries.

"DR. MIAR McLAUGHLIN."

The case found its way to the circuit court where it was tried in May, 1911. The circuit judge directed

a verdict in favor of the defendant. The case is brought here by writ of error.

Counsel for plaintiff call the paper presented a promissory note. Counsel for the estate say it should be called an executory contract. They are both agreed that much importance attaches as to how it is to be regarded in that respect. Witnesses were called who gave testimony to the effect that the signature to the paper was in the handwriting of Dr. McLaughlin. The paper was then offered in evidence. Objection was made for the reason that it was not a promissory note and that a consideration must be proven and upon other grounds. The court held a consideration must be shown, and excluded the evidence. Mr. Hinckley, the claimant, was then called to the stand, and was permitted to testify that he wrote the body of the note upon a typewriter and that he was not accustomed to using a typewriter at the time. Some questions were asked him as to what was meant by the words "undived" and "automic," but he was not permitted to answer. The claimant then proceeded to put in other testimony.

We now quote from the brief of counsel for appellant, for it may be safely assumed, and the record bears out this assumption, that as favorable a case upon the facts will be there found as the record discloses:

"Claimant then called to the witness stand Mr. Ethan C. Adams, of Battle Creek, who was acquainted with the deceased, and had met him in the year 1902. He testified:

"The first time was February 28, 1902. * * * I met him at the factory of his Automatic Coaster Brake Company here in Jackson. * * * I had a talk with the doctor that day in which the Automatic Coaster Brake Company was mentioned. The doctor asked me how I liked the brake their company was putting out—that they were making—and I told him I liked it very much. * * * I was trying to get some brakes, and I

was there for that purpose. * * * Mr. Hinckley introduced me to him as his partner.'

"Witness further testified that a Mr. Keaton and Mr. Hinckley were present on this occasion, and that he (the witness) had had experience with this coaster brake. Witness also met the doctor again in Jackson on the 13th day of April, 1902, at the doctor's residence, Mr. Keaton being also present, and had substantially the same talk with him, in which the doctor asked him about the brake, and if he thought it would sell, etc. Again in October of that same year (1902) witness saw the doctor again at his residence in company with a Mr. Losey, in which conversation the doctor asked Mr. Losey and the witness 'to go on with the business where Keaton left off; go on with the manufacture of these coaster brakes and the sale of them.' Later in the fall witness had another talk with the doctor in which the witness stated that he did not want anything more to do with the coaster brake business, and the doctor replied that he was sorry. Witness also testified referring to the conversation which the doctor had with him and Mr. Losey. He testified:

"He stated to Mr. Losey that he owned the coaster brake business. There was something said about Mr. Hinckley in connection with it, by Mr. Losey; it was at the time he wanted Mr. Losey and I to go into the business. He wanted us to go on and see if we could organize a company. He stated he owned the business. I don't remember exactly what was said that led him to make that statement. I think Mr. Losey asked him if he would give an option on the coaster brake business, the same as he did to Mr. Keaton. There was an inquiry made about Mr. Hinckley in some way that led up to his stating that Hinckley had no interest in it. The doctor stated that Hinckley had no interest in it.'

"The doctor also made the statement to this witness and to Mr. Keaton in February, 1902, that he considered the Automatic Coaster Brake business worth 'about \$20,000 or \$25,000.' Witness further testified that the second time he saw the doctor in company with Mr. Keaton the doctor and Keaton were talking about establishing the American Coaster Brake Company, and proposing to sell stock and manufacture

brakes; that the persons to be interested in this company, if organized, were Mr. Badgley, Mr. Keaton, Dr. McLaughlin, and another person, whose name witness could not recall. Claimant also called Delbert Thayer, who testified that he knew Dr. McLaughlin and also Mr. Hinckley; that he had been working on some patents himself, and that some time late in the summer of 1902, or else in 1903, as near as witness could remember, he approached the doctor for the purpose of getting financial aid to develop his patents; that his conversation with the doctor took place near the back door of their factory; and that the doctor said to him that he could not help him for the reason that he bought Mr. Hinckley's interest in the brake, and had 'to give his paper.' The deposition of R. W. Losey was also taken in behalf of claimant at Indianapolis, Ind. Losey had previously done some work for this Coaster Brake Company. He testified that early in 1902 or 1903 he had a talk with the doctor at his office in Jackson; that Mr. Adams was with him; that they were trying to find out from the doctor what the exact situation was in regard to the American Coaster Brake Company, and the possibility of getting an option on their output of brakes. The witness continued:

"The doctor said he had bought out Mr. Hinckley's interest in the company, and thought he could make arrangements to take the output if satisfactory arrangements could be made to go ahead and manufacture the brakes. I don't remember the exact date of this conversation. I do remember it was cold and there was snow on the ground. I know it was early in the fall or spring of the year after the American Coaster Brake Company had started to sell brakes and stock. They gave me stock for my services in selling stock and brakes.'"

The paper was then offered in evidence and refused. No other testimony was offered, and, as before stated, a verdict was directed for the estate.

It is insisted by counsel (we quote from the brief):

"It was not necessary to prove the actual consideration in the first instance, because a presumption of fact arises from the usual course of dealing in commercial paper that it was based upon a good consid-

eration; and, in case of indorsed commercial paper, when the indorsee or holder brings suit upon it by proving the signatures of the maker and indorser, a presumption arises that the note is supported by a good consideration, and that it was indorsed at the date of the note, or, at least before maturity, and before delivery to the holder, which presumption is sufficient *prima facie* evidence to authorize a recovery in case the fact of consideration and of indorsement before maturity is not controverted." *Manistee Nat. Bank v. Seymour*, 64 Mich. 59-72 (31 N. W. 140, 145).

Counsel cites other authorities, among them *Conrad Seipp Brewing Co. v. McKittrick*, 86 Mich. 191 (48 N. W. 1086), which counsel contends is strongly in favor of claimant.

Counsel say that if wrong in the first position that after their proof was in, there was a question to go to the jury upon the question of there being a consideration for the note, citing especially the case of *Taylor v. Taylor's Estate*, 138 Mich. 658 (101 N. W. 832). Counsel for claimant subdivide their propositions and argue them quite in detail, but we think the two heads suggested cover the questions involved. A reference to the cases cited by counsel will show them to be very different from the instant case. *Manistee Nat. Bank v. Seymour*, *supra*, was a case where counsel and the court all speak of the paper sued upon as a promissory note. In the beginning of the opinion Justice CHAMPLIN said:

"This suit is brought to enforce the collection of a promissory note dated April 12, 1884, payable in three months to the order of plaintiff, and signed by the defendant. The plea was the general issue, and notice that the note was void, it having been obtained without consideration, and under an express promise from the plaintiff that it should not be enforced; that the money mentioned in said note was advanced by the plaintiff to one H. C. Tallman, and security taken therefor in the name of the defendant at the especial

instance of, and for the sole benefit of, plaintiff, and with the express understanding between the plaintiff and defendant that he should not be held liable on said note—the security being taken in the name of the defendant, and the said note given by him to the plaintiff, as a simple accommodation to the plaintiff.”

The following excerpts from the opinion in *Conrad Seipp Brewing Co. v. McKittrick*, *supra*, will show it was unlike the case before us:

“The case was tried before the court without a jury, and written findings of fact and law filed, in which it was found that the plaintiff was a corporation, and that the defendant on the 20th day of April, 1888, made and executed for a valuable consideration the written instrument, a copy of which is given above; that by the delivery thereof to the plaintiff, which occurred on the 20th day of April aforesaid, defendant became liable to pay plaintiff \$720, with interest at 6 per cent. after maturity; that plaintiff demanded payment after the money became payable, and the defendant refused to pay; and that there was at the time of such finding due and unpaid to plaintiff on such written instrument \$801.60. * * *

“In this case the action is brought by the party to the instrument to whom the promise is made. A copy of the instrument being set out and served with the declaration, with a notice that it constituted the plaintiff's sole cause of action, it was not necessary to offer proof of its execution by defendant, as the signature was not denied under oath. Circuit Court Rule 79. The suit was brought to recover a money demand. The promise is to pay money, and its nonpayment constitutes the sole breach. In such cases a recovery may be had under the common counts, and the contract is admissible in evidence under such counts. *Port Huron, etc., R. Co. v. Potter*, 55 Mich. 627 (22 N. W. 70); *Miner v. O'Harrow*, 60 Mich. 91 (26 N. W. 843); *Phippen v. Morehouse*, 50 Mich. 537 (15 N. W. 895); *Rickey v. Morrison*, 69 Mich. 139 (37 N. W. 56); *Thomas v. Caulkett*, 57 Mich. 392 (24 N. W. 154, 58 Am. Rep. 369).

“No question is made that the consideration was not

proved. The admission of value received in the contract was *prima facie* sufficient to show that the promise contained in the contract had an adequate consideration to support it."

In *Taylor v. Taylor's Estate*, *supra*, the record shows that the papers presented were three promissory notes, and there was also evidence of their execution. We now quote from the language of Justice CARPENTER, at page 662 of 138 Mich. (101 N. W. 833) :

"(b) We are bound, also, to say that there was evidence of consideration. It is true that the notes did not contain the recital 'for value received;' but there is evidence that they were negotiable in form, and there is a presumption that such notes, though lacking the recital just mentioned, are based upon a consideration. See *Carnwright v. Gray*, 127 N. Y. 92 [27 N. E. 835, 12 L. R. A. 845, 24 Am. St. Rep. 424] ; *Dean v. Carruth*, 108 Mass. 242."

Bearing in mind that this case was tried in 1911 and that the paper is presented by the man who says he typewrote it in the absence of the man who it is claimed afterwards signed it, if we call the words "intest" interest, the word "undived" undivided, the word "automic" automatic, and the word "counters" countries, and correct the spelling and the punctuation, we have a paper which says, in substance, that Dr. McLaughlin agrees to pay Mr. Hinckley on or before April 12, 1912, \$10,000, with interest at 3 per cent., the interest to be paid on or before April 12th each year.

We now come to the consideration for the agreement:

"For his undivided half interest in the Automatic Coaster Brake Company located at 102 East Washington street, Jackson, Mich., and all patents pertaining to coaster brakes granted up to this date that have been applied for, and which will be applied for in the United States and in all foreign countries."

It will be observed that the principal sum is not due until 10 years after the date of the instrument. The paper does not purport to be given for value received. We have recited the only consideration stated. The paper indicates clearly that it was given for an undivided half interest in a business then located at a place stated, and for patents then issued, and for such as might afterwards be applied for.

What did Mr. Hinckley agree to do after this paper was made? Did he agree to sell an undivided half of the business? If so, where is the bill of sale, agreement, conveyance, or other paper in writing signed by him indicating such agreement? None was produced or offered in evidence. What patents did Mr. Hinckley sell to Dr. McLaughlin that entered into the consideration? None were produced, nor any assignments thereof to Dr. McLaughlin. If property, either a business, or patents, or both, worth \$10,000, was the consideration for the giving of this paper, and the title to said property passed to Dr. McLaughlin, it is unbelievable that there would not have been produced some writing, bill of sale, conveyance, deed, patent, or patents and assignments thereof signed by Mr. Hinckley evidencing such an important transaction. We think a verdict was properly directed.

Judgment is affirmed.

STEERE, MCALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ., concurred.

ON REHEARING.

Richard Price, George S. Law, and Thomas A. Lawler (Rollin H. Person, of counsel), for appellant.

Wilson & Cobb, for appellee.

MOORE, J. An opinion was handed down in this case some time ago. It may be found *ante*, 707 (139

N. W. 50). Later upon the request of the appellant the case was reargued. The argument and a further consideration of the record has not changed our opinion as to what should be done with the case. It is affirmed.

BROOKE, STONE, and STEERE, JJ., concurred with MOORE, J.

OSTRANDER, J. (*dissenting*). I think the writing imports consideration, and that it was for the defendant to show want of consideration. The judgment should be reversed.

MCALVAY, C. J., and BIRD, J., concurred with OSTRANDER, J.

ON SECOND REHEARING.

Rollin H. Person, Thomas A. Lawler, and Richard Price, for the motion.

Wilson & Cobb, contra.

MOORE, J. An opinion was handed down in this case some time ago. It may be found *ante*, 707 (139 N. W. 50). Later, upon the request of the appellant, the case was reargued with the same result as before, except that it was reached by a divided court. *Ante*, 715 (146 N. W. 202). Later a rehearing was ordered upon briefs to be submitted.

The rehearing and a further consideration of the record has not changed our opinion of the character of the paper called a note, but we are inclined to the opinion that there was sufficient evidence of a consideration to carry the case to a jury. For that reason we are constrained to say the case should be reversed, and a new trial ordered.

BROOKE and STONE, JJ., concurred with MOORE, J.

STEERE, J. I think the writing imports consideration, and that it was for the defendant to show want of consideration.

The judgment should be reversed.

MCALVAY, C. J., and OSTRANDER and BIRD, JJ., concurred with STEERE, J. KUHN, J., did not sit.

INDEX.

ABATEMENT AND REVIVAL—See RECEIVERS (1).

ACCEPTANCE—See FRAUDS, STATUTE OF.

ACCIDENT.

An accident is an unforeseen event, occurring without the design or will of the person whose act causes it; it partakes of the nature of an unexpected or unusual occurrence, brought about by some unknown cause, and involving something fortuitous or unexpected; or, if the cause is known, having an unprecedented consequence. *Adams v. Acme White Lead & Color Works*, 157.

See MASTER AND SERVANT (1).

ACCIDENT COMPENSATION—See MASTER AND SERVANT (9, 11).

ACCORD AND SATISFACTION.

1. The rule of law is generally recognized as well settled by the great weight of authority that payment of less than the full amount of a past-due, liquidated, and undisputed debt, although accepted and receipted for as in full satisfaction, is only to be treated as a payment *pro tanto*, and does not estop the creditor from suing and recovering the balance. *Cunningham v. Irwin*, 629.
2. The following exceptions to this general rule are recognized: when the claim is unadjusted or unliquidated; when payment is made before it is due; when a new security is given; when there is a composition with creditors and where part payment in full settlement is made by a third party who is a stranger to the claim and under no legal obligations in relation to it. *Id.*
3. Where defendant's father gratuitously undertook to pay his obligation that was due to plaintiff, paying in full satisfaction and settlement of the debt a less sum, without any consideration or promise of the son to pay back the amount advanced for this purpose, which was withdrawn from the private funds of the parent, and where the son did not bring about this arrangement, and where plaintiff intended to and did deal with the father as principal, looking to him and receiving the funds in settlement, it was a valid accord and satisfaction for a series of notes which defendant had executed to plaintiff in adjustment of a balance due on an open account. *Id.*

ACCOUNTING—See EQUITY (1).

ACQUIESCENCE—See EQUITY (6).

ACTION—See CORPORATIONS (7); LIMITATION OF ACTIONS; PLEADING (1); SALES (2, 4).

ACTUAL NOTICE—See MASTER AND SERVANT (24).

ADEQUATE REMEDY AT LAW—See EQUITY (1); FRAUD (1); INJUNCTION (1).

ADMISSIONS—See CORPORATIONS (5).

ADVERSE POSSESSION—See MUNICIPAL CORPORATIONS (1, 4); NUISANCE (1).

AFFIDAVITS—See INTOXICATING LIQUORS (3).

AGENCY—See PRINCIPAL AND AGENT.

ALTER EGO—See MASTER AND SERVANT (35, 36).

AMENDMENTS.

Under the statute of amendments, it was not error to permit plaintiff, in an action for breach of warranty, to amend his declaration on the day of trial by making the averments more specific. 3 Comp. Laws, § 10268 (5 How. Stat. [2d Ed.] § 12969). *Wolverine Spice Co. v. Fallas*, 361.

ANIMALS—See BAILMENTS (1); MASTER AND SERVANT (5).

ANTI-TRUST ACT—See CORPORATIONS (1)

APPEAL AND ERROR.

1. A judgment is necessary in a criminal as well as in a civil suit to sustain the issuance of a writ of error. If a respondent, convicted of crime, desires to review the case on exceptions before sentence, the proceeding, being statutory, should conform to the statute. *People v. Macomber*, 59.
2. Questions relating to the constitutionality of a legislative enactment, not presented to the trial court in the bill of complaint filed to enjoin the enforcement of the statute, will not be considered on appeal unless the record in some manner discloses that the points were raised in the trial court. *Jeup v. State Fire Marshal*, 232.
3. Failure to properly index a number of exhibits relied upon by defendant in its assignments of error as erroneously admitted in evidence, the index not stating in brief form the substance of each exhibit, as required by Supreme Court Rule 36, justifies the court in declining to pass on the questions raised by the assignments in a lengthy case involving 126 assignments of error and in which the ex-

APPEAL AND ERROR—Continued.

- hibits were not printed in the record, but produced as part of the bill of exceptions at the argument. *Shoven v. J. L. Owens Co.*, 265.
4. The proper practice to review an excessive or insufficient verdict is to move to set aside the verdict; the amount of damages will not be considered on appeal unless the point is presented on a motion for a new trial. *Id.*
 5. Objections and exceptions are essential to review, on appeal, the admissibility of evidence received at the trial of an action at law. *Wolverine Spice Co. v. Fallas*, 361.
 6. In order to review, on error, prejudicial statements or argument of attorneys, it is essential to secure a ruling of the court by bringing the matter to the attention of the court, not simply by taking exceptions. *Eberts v. Mt. Clemens Sugar Co.*, 451.
 7. An assignment of error that the court erred in denying defendant's motion for a new trial, which contained the objection that the court erred in failing to charge as requested in defendant's requests, was too general, where the requested instructions covered six pages of the record. *Id.*
 8. An assignment of error that the verdict was contrary to the evidence did not raise the point that the verdict was contrary to the overwhelming weight of the evidence. *Id.*
 9. *Held*, that the testimony warranted a verdict for plaintiff. *Id.*
- See **BROKERS** (1); **CRIMINAL LAW** (11); **MASTER AND SERVANT** (2); **NEW TRIAL**; **RECEIVERS** (3); **TRIAL** (2, 11).

APPLIANCES—See MASTER AND SERVANT (42).

APPROVAL OF LIQUOR BOND—See INTOXICATING LIQUORS (1); MUNICIPAL CORPORATIONS (6).

ARBITRATION AND AWARD.

1. Under an arbitration contract submitting to the arbitrators questions relating to the performance of a contract for the construction of a building, and to questions of damage, labor or materials, the arbitrators obtained jurisdiction of the owner's claim for liquidated damages, for delay, although it was provided in the construction contract that only in case of a disagreement as to the decision of the architect, in regard to work added to or taken from the plans and specifications, should the questions be arbitrated; and although by express terms in the arbitration agreement the contract was made the sole basis of arbitration. *Early v. Tussing*, 314.
2. While it was competent for the parties to a construction
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ARBITRATION AND AWARD—Continued.

or building agreement to stipulate for liquidated damages if the building should not be completed within the time fixed by the contract, the arbitrators could not apportion the damages between contractor and owner in accordance with the degree of blame for various delays, charging two-thirds of the damages to the contractors and the remainder to the owner. *Id.*

3. Where the parties are mutually responsible for the delays because of which the building is not completed in time, the stipulation as to liquidated damages is annulled and, in the absence of some provision under which another date can be substituted, it cannot be revived. *Id.*

ARGUMENT OF COUNSEL—See TRIAL (4, 7, 8, 11).

ARREST—See ASSAULT AND BATTERY; FALSE IMPRISONMENT (1-3, 6); PLEADING (3).

ASSAULT AND BATTERY.

Where defendant attempted to pass over plaintiff's land to reach a private gravel pit, claiming that he was going to the property of a municipal corporation which had a license to cross the land of plaintiff, who disputed his passage and assaulted defendant, and he thereupon seized plaintiff, threw her into a vehicle and carried her before a justice of the peace, and where she pleaded guilty and was fined, defendant was excused if she intelligently confessed herself guilty of the offense with which he charged her; but if she did not intelligently plead to the complaint and had tried to prevent a trespass by defendant upon her property, using only necessary force, she was entitled to recover. *Nay v. Dickinson*, 685.

See PLEADING (3).

ASSIGNMENTS OF ERROR—See APPEAL AND ERROR (7).

ASSUMPSIT—See INFANTS (2); PLEADING (2); SALES (2).

ASSUMPTION OF RISK—See MASTER AND SERVANT (25, 33, 34, 39, 41, 44).

AUTOMOBILES—See CRIMINAL LAW (3-5).

BAILMENTS.

The bailee of a horse for hire, to be used in a lumber camp, was under obligation to the bailor to see that the horse was used and treated with reasonable care, and in the way in which such animals are ordinarily treated by prudent men, who own or have them in charge. *Pesola v. Forsten*, 94.

See MASTER AND SERVANT (5)

BANKS AND BANKING.

1. In an action against a bank for money received for the use of plaintiff, evidence that the defendant was instructed to forward the amount received to an address given by plaintiff; that in accordance with the usual practice of the bank, an employee placed the draft in a letter which was placed among a number of others and tied into a bundle that was later deposited in the post office; that the envelope was addressed to plaintiff at the place mentioned in his instructions; that he was absent from that place on the day when the letter would probably have arrived, that the persons present at such time did not receive the letter and the draft had never been presented for payment to the drawee, *held*, to present an issue of fact for the jury as to the proper mailing of the draft. *Smith v. City Nat. Bank of Lansing*, 76.
2. The burden of establishing the mailing of the draft was on the defendant. *Id.*
3. In determining the issue, plaintiff was entitled to the benefit of the probabilities and inferences connected with and growing out of the United States mail service and ordinary experience. *Id.*

See DAMAGES (1, 2); EQUITY (1); EVIDENCE (6).

BENEFICIAL ASSOCIATIONS—See INSURANCE.

BEST EVIDENCE—See EVIDENCE (7).

BILLS AND NOTES.

1. Where the plaintiff claimed that the payee of a note executed by plaintiff and held by defendant owed him a stated sum on a separate account and plaintiff desired to pay the note, except that amount, which he deposited with the defendant to protect the indorser on the paper, the charge of the court that if no such arrangement was made and the money paid to satisfy the debt, plaintiff could not recover, sufficiently presented the issues to the jury; there was no error in refusing to charge that if the bank purchased the note in due course, plaintiff could not recover. *Conroy v. Hafner*, 289.
2. Upon the trial of an action in the nature of a claim against the estate of a decedent based on a non-negotiable instrument in writing whereby decedent agreed to pay claimant \$10,000 on or before ten years from its date, reciting as consideration that it was given for a half interest of claimant in a patent coaster brake, and in a corporation organized to manufacture it, evidence of a sufficient consideration was not necessary to establish a case: claimant could recover without proof of an assignment or conveyance of the half interest in the patent, the instrument importing consideration: it was for defendant to show want of consideration.

BILLS AND NOTES—Continued.

MOORE, BROOKE, and STONE, JJ., concurring on the ground that the evidence tended to prove a sufficient consideration. *In re McLaughlin's Estate*, 707.

BOILERS—See **MASTER AND SERVANT** (17, 20); **TRIAL** (9).

BONDING LIMIT—See **SCHOOLS AND SCHOOL DISTRICTS** (2).

BONDS—See **INTOXICATING LIQUORS** (4, 5, 7, 8); **MUNICIPAL CORPORATIONS** (6); **SCHOOLS AND SCHOOL DISTRICTS** (1-4).

BOOKS OF ACCOUNT—See **EVIDENCE** (3, 5, 6).

BOUNDARIES—See **EMINENT DOMAIN**.

BREACH OF CONTRACT—See **CORPORATIONS** (7); **SALES** (1).

BREACH OF WARRANTY—See **AMENDMENTS**; **EVIDENCE** (1, 11); **SALES** (3, 4).

BRIDGES—See **MUNICIPAL CORPORATIONS** (10).

BROKERS.

1. Evidence tending to show that plaintiff, a firm of brokers, agreed to effect an exchange of defendant's stock of hardware and a store building for other property for a stated commission; that a contract of exchange was executed but never carried out, contradicted by the testimony of defendant that the commission was to be paid if the deal went through, but not otherwise, *held*, to present a question of fact for the jury, as to the right to commissions; but both parties acquiescing in the statement of the trial court that it was agreed he should direct a verdict one way or the other, plaintiff could not complain or review a verdict directed against it. *Wolverine Farms Co. v. De Young*, 200.
2. The owner of real property, who, after giving to a broker the agency to sell his land on commission, interferes with a prospective buyer, cancels the broker's authority, and, knowing that negotiations for a sale are under way, effects the sale of his property by abating his price, is liable to the broker for the agreed commission or compensation. *Davis-Fisher Co. v. Hall*, 574.
3. Where the owner of a house listed it with plaintiff, a broker firm, and, meeting a prospective buyer to whom plaintiff had shown the realty on the previous day, informed the buyer that the firm had no authority to sell it and named a price which was less than plaintiff claimed he had fixed in his conversation with the firm, when it was claimed he had stated that he would allow plaintiff all it could obtain over \$2,800 as its commission, a verdict for the commissions of the broker was warranted by the testimony. *Id.*

BUILDING CONTRACT—See ARBITRATION AND AWARD.

BURDEN OF PROOF—See BANKS AND BANKING (2); BILLS AND NOTES (2); EVIDENCE (12).

CADILLAC CHARTER—See ELECTIONS.

CANCELLATION OF INSTRUMENTS—See DURESS (2-4).

CARRIERS.

1. Evidence tending to show that plaintiff, a girl of about nine, and her brother about four years older, bought tickets and took a train of defendant railway company, the conductor of which agreed to let them know when to alight, that he neglected to tell them, and deposited the children nearly five miles from their destination, so that they were forced to walk back through a snow storm in cold weather nearly seven miles, and the plaintiff suffered from exposure and had a relapse into a serious illness from which she had recently recovered, *held*, to sustain a verdict for the plaintiff and finding that the illness was the proximate result of plaintiff's being carried past her destination. *Moss v. Detroit & Mackinac R. Co.*, 40.
2. The court did not err in refusing to submit a request of defendant that if there were places where the children could have stopped and avoided exposure it was their duty so to do. *Id.*
3. Evidence, in an action for the unlawful killing of decedent, a passenger who was at a station intending to take a train of the defendant at night, *held*, to present an issue for the jury upon the alleged negligence of defendant railway company and the contributory negligence of the deceased. *Richardson v. Railway Co.*, 176 Mich. 413 (142 N. W. 832). *Richardson v. Detroit & Mackinac R. Co.*, 206.
4. Where an employee of a lumber company rode to and from his work on a logging train of the defendant railroad company, without charge for transportation, and it appeared that the defendant carried few passengers over this portion of its road, which was a logging branch, and that those who did ride were required to sign a release of liability, with a provision that the passenger assumed all risks, also that the defendant had filed and published its schedules of rates pursuant to Act No. 300, Pub. Acts 1909 (3 How. Stat. [2d Ed.] § 6524 *et seq.*), and in accordance with the provisions of section 5 of the statute was prohibited from carrying passengers free, excepting certain classes of persons (which did not include decedent), he was a mere licensee, and whether he innocently or willfully violated the law, he was entitled to no greater rights than one who procured the pass by consenting to assume all risks of transportation. *Van Auken v. Michigan Central R. Co.*, 331.

See RAILROADS (4, 5).

CASE—See PLEADING (1, 2).

CAUSE—See EVIDENCE (2).

CERTIFIED CHECKS—See DAMAGES (1).

CERTIORARI.

The return of a justice of the peace in certiorari to review respondent's conviction of the crime of larceny must be taken as true. *People v. Grimm*, 643.

See MASTER AND SERVANT (2).

CHALLENGE TO ARRAY—See JURY.

CIRCUIT COURT COMMISSIONERS—See LANDLORD AND TENANT.

CITIES—See CONSTITUTIONAL LAW (1); MUNICIPAL CORPORATIONS (3).

CODICIL—See WILLS (5, 7).

COERCION—See DURESS (3).

COMMISSIONER OF HIGHWAYS—See HIGHWAYS AND STREETS (1).

COMMISSION FORM OF GOVERNMENT—See ELECTIONS.

COMMISSIONS—See BROKERS.

COMPETENCY—See DEEDS (2, 3).

COMPETENCY OF SERVANT—See MASTER AND SERVANT (32).

COMPROMISE AND SETTLEMENT—See ACCORD AND SATISFACTION; JUDGMENT (1); PRINCIPAL AND AGENT (2).

COMPROMISE VERDICT—See TRIAL (2, 3).

COMPUTATION—See EVIDENCE (13).

CONDITIONAL PURCHASE—See DAMAGES (1).

CONFESSIONS—See CRIMINAL LAW (1, 2).

CONFLICT OF LAWS—See INSURANCE.

CONJECTURE—See MASTER AND SERVANT (26, 27).

CONSIDERATION—See BILLS AND NOTES (2); HUSBAND AND WIFE (2); MORTGAGES (2).

CONSPIRACY—See CORPORATIONS (3, 4).

CONSTITUTIONAL LAW.

1. Under the charter of the city of Wyandotte, framed pursuant to Act No. 279, Pub. Acts 1909 (2 How. Stat. [2d

CONSTITUTIONAL LAW—Continued.

Ed.] § 5442 *et seq.*), and requiring the city commission to select supervisors of election who should serve with the assessor on the board of supervisors, the appointment by the commission was constitutional and valid: it is not essential that the supervisors should be elected in order to comply with the home rule law and with the Constitution, art. viii, §§ 7, 18, since the people of the city, by adopting a charter that provided for such appointment, made choice of its method of selecting the representative on the board. The townships in the county could have no voice in the matter by whichever method the supervisor should be designated. *Attorney General, ex rel. Lodge, v. Bryan*, 86.

2. A statute regulating the operation and construction of theaters and moving picture shows, providing for inspection by the State fire marshal and the issuance of a license, is not local legislation in conflict with the provisions of the Constitution forbidding the enactment of local or special acts or the constitutional requirements for municipal charters and local self-government. (Act No. 257, Pub. Acts 1913.) *Jeup v. State Fire Marshal*, 231.
3. A local act entitled "An act to incorporate the city of Traverse City in the county of Grand Traverse, and to repeal all acts and parts of acts in conflict therewith," was sufficiently entitled to warrant the inclusion of provisions for the board of education and establishing a school district (Act No. 424, Local Acts 1895); especially after 20 years had passed during which the board of education had exercised its franchise and privileges as authorized by the act; and in view of 2 Comp. Laws, § 4650 (4 How. Stat. [2d Ed.] § 9871), providing that school districts shall be presumed to be legally organized after exercising the franchise of a district for two years. *Board of Education of Traverse City v. Straub*, 665.
4. The legislature by Act No. 279, Pub. Acts 1909 (2 How. Stat. [2d Ed.] § 5442), has retained sole power to alter, amend or repeal special acts affecting the public schools. The electors of a city have no authority to amend the provisions of an act establishing the school district of Traverse City, by including matters in relation thereto in a new charter adopted under the Constitution and laws of 1909. *Id.*

See APPEAL AND ERROR (2); INTOXICATING LIQUORS (2); MASTER AND SERVANT (7).

CONSTRUCTION OF DEEDS—See EASEMENTS (2).

CONSTRUCTION OF STATUTE—See MASTER AND SERVANT (8-11).

CONSTRUCTION OF WILLS—See WILLS (4).

CONTEMPT.

1. It is not an open question in this State that the court may punish an offender as for criminal contempt: the power is conferred by 1 Comp. Laws, § 1098 (5 How. Stat. [2d Ed.] § 12589), and exists independently of the statute. *In re Dingley*, 44.
2. The issue in cases of criminal contempt is not for a jury but for the court. *Id.*
3. The publication in a newspaper of an article charging the judge, who was presiding over a grand jury, with being the author of an attack upon the prosecuting attorney purporting to issue from the jury, that he used the grand jury for a club to get even with certain citizens of the county, and otherwise criticising his conduct, was a contempt of court, unless the truth of the article could be established. *Id.* 45.
4. While the judge who was criticised was not thereby disqualified from sitting in the contempt proceeding, the better practice is to call in another judge. *Id.*
5. *Held*, also, that it was improper to proceed with undue haste so as to deprive the offender of a fair opportunity to prepare his case; and that the issuance of an order to show cause dated February 9, 1914, returnable on the 16th of February, on which date the court proceeded to impose punishment, against the protest and objection of his counsel, who asked for more time, did not afford a reasonable opportunity for the respondent to defend himself. *Id.*
6. Where a daughter of one of the heirs of a decedent attempted to interfere with the control of real property of the estate in the possession of the administrator, a trust company, which filed an injunction bill and secured a restraining order prohibiting respondent from trespassing upon the land or interfering with the tenants who leased the property from such administrator, and respondent thereafter claimed the right to ignore the injunction and tried to eject the persons occupying a portion of the land, of which the respondent claimed to have been in possession as agent of her father during a short period of time, the conviction of respondent for contempt of court was warranted, and a fine properly imposed, as the administrator claimed to have no knowledge of such alleged possession by respondent and she refused to recognize its authority or the jurisdiction of the court. *Michigan Trust Co. v. McNamara*, 424.

CONTRACTS—See ARBITRATION AND AWARD; BROKERS (1, 2); CORPORATIONS (6, 7); DEEDS (2); DURESS (1-3); EQUITY (4); EVIDENCE (1, 11); FRAUD (3); FRAUDS, STATUTE OF; HUSBAND AND WIFE (1); INFANTS; INSURANCE; PRINCIPAL AND AGENT (1, 3); REFORMATION OF INSTRUMENTS (4); SALES (1, 2).

CONTRIBUTORY NEGLIGENCE—See CARRIERS (2, 3); CRIMINAL LAW (7); MASTER AND SERVANT (19, 28, 31, 34); MUNICIPAL CORPORATIONS (10).

CONVERSION—See MUNICIPAL CORPORATIONS (7).

CONVEYANCES—See ESCROWS.

CORPORATE STOCK—See PLEDGE (1).

CORPORATIONS.

1. Evidence tending to show that respondent corporation used unlawful means in competing with its business rivals; that it interfered with their contracts and salesmen; that it circulated damaging statements relating to their credit and standing; that it employed spies, and instituted numerous suits for infringement of patents without intending to prosecute them to a final conclusion, etc., reviewed, and *held*, to establish the averments of relator's petition in quo warranto, charging that respondent exercised a monopoly in the business of manufacturing and selling cash registers, and *held*, that the intent to create a monopoly was shown to exist. Act No. 329, Pub. Acts 1905 (2 How. Stat. [2d Ed.] § 2945). *Attorney General, ex rel. James, v. National Cash Register Co.*, 99.
2. A monopoly, in the modern sense, is created when, as a result of efforts to that end, previously competing businesses are so concentrated in the hands of a single person or corporation, or a few persons or corporations acting together, as that they have the power to practically control prices of commodities and thus suppress competition. *Id.*
3. It is sufficient if the relator shows that the incorporators of the respondent acted together to establish a monopoly in pursuance of a common object; an agreement or contract to work together need not be proved. *Id.*
4. Where the effect of the testimony offered was to establish that successive corporations had been formed under the laws of different States and had carried out or furthered the creation of a monopoly with the co-operation of the principal stockholders, that the same parties had been interested in the various companies that had been formed, and the existing company had substantially the same officers and stockholders as the first organization, evidence was admissible to show the wrongful acts and purpose of the corporations existing prior to the organization of respondent and might properly be considered as explaining and characterizing the acts of respondent. *Id.*
5. Acts and conduct of officers and agents of the respondent were admissible in evidence to show the purpose to create a monopoly; and specific transactions and admissions of agents and sales managers done in furtherance of their employment were valid proof of the illegal intent, although a part thereof took place a number of years prior to the

CORPORATIONS—Continued.

admission of the present corporation to transact business in Michigan. *Id.* 100.

6. There are two ways, at least, of interfering illegally with contracts of other persons, *first*, by preventing the making of such contracts; *second*, by causing them to be broken after they are made. *Id.*
7. To establish a right of action for procuring a party not to enter into contract relations, it is essential to prove: (1) notice to the defendant of the relation existing between the parties to the proposed contract; (2) interference with that relation, and (3) damages resulting from this interference. *Id.*
8. While it is lawful and proper for the owner of a patent to give notice of infringement to any person using an infringing article and it is permissible to prosecute a suit against the infringer or user, or to bring an action for damages, the proceedings must be instituted in good faith and not to annoy or intimidate or drive out of business a competitor. *Id.*
9. As an excuse for resorting to unfair means of competition it was not sufficient that competitors of the respondent also employed similar measures, or that their acts were unlawful. *Id.*
10. The punishment to be imposed under the statute (3 Comp. Laws, § 9961; 5 How. Stat. [2d Ed.] § 14076), rests in the sound discretion of the court whether a judgment of ouster should be entered or a fine imposed; and *held*, under the evidence, that a fine of \$10,000 should be assessed against respondent. *Id.*
11. No title to land was conveyed by a resolution of the board of directors of the holder of the fee, a corporation, to sell the land for a given consideration, authorizing the officers to sign the proper deeds of conveyance, which, however, were not shown to have been executed. *Kushler v. Weber*, 224.

See FRAUD (2); MUNICIPAL CORPORATIONS (7); RECEIVERS; WITNESSES (1).

CORRESPONDENCE—See EVIDENCE (7).

COUNTY BOARD OF SUPERVISORS—See CONSTITUTIONAL LAW (1).

COURTS.

The tribunal which first obtains jurisdiction of a question which may be passed upon either in a State or in a Federal court, obtains and holds exclusive jurisdiction, until the power of the court is exhausted. *Michigan Railroad Commission v. Detroit & Mackinac R. Co.*, 234.

See CONTEMPT; RAILROADS (1).

CRIMINAL LAW.

1. The question whether a confession was voluntary or involuntary is for the court, if the matter is clear and the testimony is undisputed; if there is ground for doubt, the court may leave it to the jury to determine whether or not the confession should be considered. *People v. Prestidge*, 80.
2. Where the respondent was taken into custody without being informed concerning the charge, was taken to the prosecuting attorney's private office, where he was first advised of the fact that he was charged with statutory rape; and where he was advised by the officers that he had better tell the truth, and was questioned closely for two or three hours, and where his wife was brought into an adjoining room and underwent an attack of hysteria, respondent hearing the moans and afterwards admitting that he wished he had told her the truth, etc., the alleged confession of the accused should have been rejected by the court. *Id.*
3. Upon the trial of a respondent charged with negligently killing a young girl by colliding with her in operating an automobile on a public highway at an excessive rate of speed, the trial court erred in admitting the testimony of an eyewitness that the average speed before reaching a point 50 or 60 feet behind the decedent from a place about a mile distant was 30 miles an hour; the court taking judicial notice of the fact that a competent chauffeur, as the respondent was shown to be, would be able to change the speed at different points. *People v. Barnes*, 179.
4. It was also incompetent to introduce testimony showing the rate of speed of an automobile that was like the car which respondent was driving, more than a mile and a half away from the place of accident, the identification by such witness being incomplete; as the point at which the observation was made was too remote from the place of accident. *Id.*
5. The trial court in its charge to the jury should not have eliminated the questions of proximate cause and the negligence of decedent by instructing the jury that if at the time the accused ran upon the deceased he was operating his car in excess of ten miles an hour he was guilty of manslaughter: respondent was, also, entitled to have the jury consider the question whether he was aware that he was doing the alleged unlawful act, as bearing upon the charge of gross negligence. *Id.* 180.
6. Although a wilful violation of the statute might constitute negligence, it does not follow that such negligence would, under the circumstances of each case, amount to manslaughter. *Id.*
7. The questions for the jury to determine were whether the act of the respondent in driving at an excessive rate of

CRIMINAL LAW—Continued.

speed was the proximate cause of the death of decedent: and whether respondent was responsible under the law whether her failure to use due care contributed or not to her injury. *Id.*

8. It must be made to appear in such a proceeding that the homicide was the natural and necessary result of the unlawful act; that death ensued because of, and as a direct and natural result of, the recklessness or gross negligence of the respondent. *Id.*
9. Not every degree of carelessness or negligence renders a party guilty of manslaughter; the case may be one of mere misadventure; to warrant a conviction, there must have been gross negligence, which is criminal and, within certain limits, supplies the place of affirmative criminal intent. *Id.*
10. It was prejudicial error to permit the prosecution to show that the accused committed an offense of the same nature which the information charged, at a subsequent date; having identified a particular transaction shown by the testimony, the prosecution was not entitled to offer proof of a similar act occurring at a later time. *People v. Ayers*, 242.
11. The court did not cure such error by instructing the jury that respondent could not be convicted of the later offense shown by such incompetent testimony, although if, as requested by respondent's counsel, he had charged that the acts, if any, could not be considered for any purpose, the error might have been cured. *Id.*
12. In criminal trials the venue must be proved by competent evidence, beyond a reasonable doubt, and judgment cannot be sustained in a cause in which the record contains no proof of the township or county wherein the alleged crime occurred. *Id.*
13. Although the court may take judicial notice of the extent and boundaries of political subdivisions such as counties, townships, cities and villages, the rule cannot be extended to include a farm or other locality designated by the name of its present or former owner. *Id.*

See APPEAL AND ERROR (1); CERTIORARI; CONTEMPT (1); FALSE IMPRISONMENT (1); RAPE; VENUE.

CRIMINAL NEGLIGENCE—See CRIMINAL LAW (4).

CROSS-EXAMINATION—See WITNESSES (2).

CUSTOMS AND USAGES—See EVIDENCE (3).

DAMAGES.

1. Where plaintiff sent to defendant a certified check for the purchase of defendant's claims against an insolvent lumber corporation, and stated in writing that it was given

DAMAGES—Continued.

on condition that a receiver's sale of assets of the insolvent to plaintiff should be confirmed, plaintiff was entitled to the return of the check when the condition was not fulfilled, and, being required by the drawee to borrow enough money to cover the check, which defendant required to be paid, and being forced to pay interest on the loan during the time that the defendant wrongfully withheld the paper, the plaintiff should have been awarded a judgment for the loss so occasioned. *Preston v. People's Sav. Bank of Traverse City*, 417.

2. Testimony of the plaintiff that the State banking commissioner directed the drawee bank to charge the certified check to the account of the plaintiff, and that he borrowed sufficient funds to cover the check, and was obliged to pay interest on the loan for nearly two years, after he demanded the return thereof, sufficiently proved the payment in good faith of the money, and warranted a judgment for plaintiff of that amount. *Id.*

See **ARBITRATION AND AWARD** (1, 2); **EVIDENCE** (4, 5, 13); **INJUNCTION** (2); **MASTER AND SERVANT** (16); **MUNICIPAL CORPORATIONS** (8, 9); **WATERS AND WATERCOURSES**.

DAMS—See **WATERS AND WATERCOURSES**.

DEATH—See **ESCROWS** (2); **HOMESTEADS** (1); **MASTER AND SERVANT** (1, 8, 13); **MUNICIPAL CORPORATIONS** (10).

DEBTOR AND CREDITOR—See **ACCORD AND SATISFACTION**; **ESCROWS** (2, 3); **HOMESTEADS**; **PRINCIPAL AND AGENT** (2).

DEED AS MORTGAGE—See **MORTGAGES** (1, 2, 4, 6).

DEEDS.

1. Where plaintiff, in ejectment, claimed a parcel of land described in the declaration, by virtue of a deed of the east five acres of land, and defendant claimed title under a deed transferring the westerly 75 acres, neither deed including the strip in controversy between plaintiff and defendant 57 feet wide, and plaintiff did not show any conveyance to him of the intervening parcel, although he obtained quitclaim deeds of the persons who had occupied this strip, plaintiff was not entitled to recover: the rule that plaintiff must recover on the strength of his own title, not on the weakness of the defendant's, is applicable to the case. *Kushler v. Weber*, 224.
2. Evidence tending to show that the grantor of certain real property was incapacitated by excessive use of intoxicants from entering into a valid contract of conveyance, considered as an issue of fact, and *held*, not sufficient to sustain a decree annulling the deeds. *Somers v. Ferris*, 392.
3. A drunkard is held incompetent to execute a conveyance

DEEDS—Continued.

only upon proof that at the time of the act, his understanding was clouded or his reason dethroned by actual intoxication. *Id.*

See CORPORATIONS (11); EASEMENTS; EQUITY (3, 4); ESCROWS; HUSBAND AND WIFE (3); MORTGAGES (2); REFORMATION OF INSTRUMENTS (8); TAXATION (6).

DEFAULT—See ARBITRATION AND AWARD (2, 3).

DEFECTIVE MACHINERY—See MASTER AND SERVANT (14).

DELAY IN ISSUING BONDS—See SCHOOLS AND SCHOOL DISTRICTS (4).

DELIVERY—See ESCROWS (1).

DEMAND—See FRAUD (3); LIMITATION OF ACTIONS.

DEMURRER—See FRAUD (1); MASTER AND SERVANT (17, 19).

DESCENT AND DISTRIBUTION—See WILLS (2, 3).

DESCRIPTION OF REAL PROPERTY—See DEEDS (1); TAXATION (2).

DEVICES—See PARTITION.

DIRECTED VERDICT—See CARRIERS (3); MASTER AND SERVANT (12, 14, 25, 42); MUNICIPAL CORPORATIONS (10); PLEADING (3); PRINCIPAL AND AGENT (3); RAILROADS (6); TRIAL (12).

DISCHARGE—See MORTGAGES (3).

DISCLOSURE—See GARNISHMENT.

DISQUALIFICATION OF JUDGE—See CONTEMPT (4).

DISSOLUTION—See RECEIVERS (1).

DRUNKARDS—See DEEDS (2, 3).

DURESS.

1. Duress exists where one is induced by the wrongful act of another to make a contract or perform some act under circumstances which prevent his exercising his free will. *Lewis v. Doyle*, 141.
2. A wife may undoubtedly avoid a contract, otherwise valid, made by reason of the threatened criminal prosecution of her husband. *Id.*
3. In cases based on alleged duress, the question is whether the complainant acted under the coercion of threats made by the defendant or his employees. *Id.* 142.
4. The mere fact that complainant's husband informed her that he had misappropriated money belonging to his em-

DURESS—Continued.

ployer, and feared he would be forced to go to jail, was not sufficient evidence of duress to avoid conveyances of the complainant to such employer of her husband in satisfaction of the claim. *Id.*

EASEMENTS.

1. Under a warranty deed conveying to the complainant a parcel of land and "a right of way one rod wide commencing," etc., describing the way and providing that complainant and defendant should have joint rights in the use thereof, complainant did not acquire a title in fee simple, but an easement in the way, and the court properly refused a decree restraining defendant from tearing down a fence which complainant had erected along the parcel granted to him for easement purposes. *Warden v. Linebarger*, 1.
2. Where an easement was reserved by two deeds of conveyance, executed by the owner of an entire parcel to separate grantees, of adjoining portions of the land, about the same time, and where the right of way was used continuously by the grantees of both parcels for a number of years afterwards, the conveyances should be construed together to determine the intent of the grantors. *Longton v. Stedman*, 405.
3. Complainants' predecessors in title reserved a right of way eight feet wide off the north side of the parcel granted and subsequently acquired by complainants. In the same instrument it was stipulated that the grantors would not erect or permit to be erected any buildings on the land north of complainants' parcel nearer than five feet to the line between the properties. Later the grantors conveyed the remaining parcel to defendants by mesne conveyances, in which the same right of way and building restriction was expressed. The 13-foot strip was used jointly for a right of way to reach a barn situated at the rear of the two parcels by the owners of both pieces for considerable time, and defendants finally constructed a building upon the land included in the building restriction. *Held*, that whether this restriction affecting the five-foot parcel was intended to preserve the right to light and air only or was intended to enable the complainants to use it with the eight-foot strip, the court of equity will protect the rights of the complainants. *Id.* 406.

See EQUITY (5, 6).

EJECTMENT—See CORPORATIONS (11); DEEDS (1); TAXATION (7, 8).

ELECTION—See INFANTS (2).

ELECTION OF FORUM—See RAILROADS (1).

ELECTIONS.

The provisions of the Cadillac charter requiring that the candidate for any office who shall receive a majority of the first-choice votes for such office shall be declared elected, and if no candidate shall receive a majority of the first-choice votes, then the second-choice votes shall be added to the first-choice votes and the one receiving the largest number of combined first- and second-choice votes shall be declared elected, etc., require a majority of all the votes cast for the office in order to elect; a plurality is insufficient even if none of the candidates receives a majority, where the charter expressly defines a majority as more than half the total votes cast. *Garneau v. Commission of City of Cadillac*, 91.

See SCHOOLS AND SCHOOL DISTRICTS (3).

ELEVATORS—See EVIDENCE (8); MASTER AND SERVANT (14).

EMINENT DOMAIN.

Where the highway commissioner filed a petition to condemn a public highway along the boundary line between two sections of land two rods on either side of the said line which formed the boundary between respondent and his neighbors, and where, at the trial, a contest arose as to the true position of the quarter post and of the section boundary, upon the testimony showing surveys made by different parties, and the jury found that the survey as made or claimed by one surveyor was correct but awarded damages on the basis of another survey, for $4\frac{1}{2}$ acres of land, although the parcel as set forth in the petition was two rods wide on the east side of the section line, and 160 rods long, containing only two acres, the verdict was inconsistent and must be reversed on error. *Letourneau v. Erickson*, 617.

See HIGHWAYS AND STREETS (1).

EMPLOYERS' LIABILITY ACT—See MASTER AND SERVANT (2, 8-11).

EMPLOYMENT, COURSE OF—See MASTER AND SERVANT (1, 3, 5).

EQUITY.

1. A bill of complaint for an accounting, instituted by complainant as depositor of a national bank, averring that her husband, without authority, had drawn checks on her account in her name, that complainant had warned defendant bank not to honor checks signed by him and that she had executed a mortgage to satisfy an alleged indebtedness to the bank, due to his unauthorized transactions, and that the mortgage was used to satisfy a debt of her husband, that complainant subsequently gave her note to the bank, which the bill charged was void on the ground of coverture, *held*, demurrable: complainant had

EQUITY—Continued.

- an adequate remedy at law and the court of equity would not interpose its jurisdiction to require the surrender of jewelry and other valuables in the possession of defendant bank. *Levitan v. Houghton Nat. Bank*, 30.
2. Where one of two innocent parties must suffer by reason of the acts of a third, the loss must be borne by the one who enables the third person to cause the loss or damage. *Ehle v. Looker*, 249.
 3. The court of equity will inquire into the inadequacy of price paid for land which was conveyed upwards of six years previously to the date of commencing suit, only so far as may be necessary to ascertain that the price paid was not so grossly inadequate as to shock the conscience and necessarily imply fraud. *Somers v. Ferris*, 393.
 4. Where complainant knew the facts in relation to his claim that certain conveyances were made when he was incapacitated from executing a valid deed, within a year after he conveyed the real property, but he took no steps to set aside the deeds within five years, during which time defendant expended large sums in clearing up the title and making improvements, the claim was barred by laches. *Id.*
 5. No facts amounting to an estoppel or laches were presented by evidence showing that complainants had no knowledge that defendants were erecting a building on the easement, that as soon as they discovered the situation they demanded that it be removed, defendants having completed the structure in about two weeks. *Longton v. Stedman*, 406.
 6. Mere delay and acquiescence are insufficient to defeat an equitable remedy based on a strict right, unless the acquiescence or failure to act has continued so long as to defeat the right itself. *Id.*
 7. Some act done upon the strength of delay or some right lost or claim relinquished is essential to estoppel arising from delay in enforcing a right. *Id.* 407.
- See CONTEMPT (6); EASEMENTS (1, 2); ESCROWS (3); FRAUD (1); INJUNCTION (1, 2); JUDGMENT (1, 2); PLEDGE; REFORMATION OF INSTRUMENTS (1, 7).

EQUITY JURISDICTION—See MANDAMUS (2).

EQUITY PRACTICE—See RECEIVERS (1).

ESCROWS.

1. Evidence that decedent delivered a deed of his homestead to a third party to be delivered to the son of grantor; that no such instructions were given as to the length of time the deed was to be held; that although the witness under-

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ESCROWS—Continued.

stood the conveyance was to be delivered at the death of the father, and such intent was clearly to be inferred, no such instructions were specifically given; that the conveyance was made to induce the son to advance about \$120 to the father; and that the money was advanced, held, to be insufficient to satisfy the requirement of law that proof of the oral directions must be clear and convincing. *Brown v. Keiser*, 432.

2. By delivery of a deed in escrow to be surrendered to the grantee only after the decease of the grantor, a conveyance of the fee is accomplished, operating as of the date of delivery, the enjoyment being postponed until the grantor's death. But, in equity, such a legal fiction cannot be permitted to defeat just claims of creditors which arose before the second delivery of the escrow. *BROOKE, KUHN, OSTRANDER, and BIRD, JJ.*, concurring on the ground that no delivery was proved and dissenting from the reasoning that if a delivery in escrow was effected, the conveyance should be set aside in favor of creditors. *Id.*

3. But the decree, in a suit to set aside the deed as fraudulent, should have been so drawn as to permit the grantees in the deed to pay the claims against decedent, and costs, within a limited period, and not setting aside the transfer absolutely. *Id.*

ESTATE BY ENTIRETIES—See HUSBAND AND WIFE (2).

ESTATES—See REFORMATION OF INSTRUMENTS (7).

ESTATES OF DECEDENTS.

Administration of a will in the probate courts of the State of Illinois without ancillary proceedings in Michigan is insufficient to pass title to the devisees of real property under the will of a decedent who resided in Illinois, owning realty in this State. *Rolph v. Rood*, 590.

See BILLS AND NOTES (2); CONTEMPT (6); REFORMATION OF INSTRUMENTS (2, 4, 5); WILLS.

ESTOPPEL—See EQUITY (5, 7); LANDLORD AND TENANT (1); MORTGAGES (2); REFORMATION OF INSTRUMENTS (5).

EVIDENCE.

1. In an action for breach of warranty of a number of threshing machines furnished by the manufacturer to its sales agent, it was not erroneous to receive in evidence the testimony of employees and officers of the agent who had examined several of the machines returned as defective at the shops of the sales agent, and who testified that the condition of the machines indicated defects and breakages as claimed and shown by certain of the purchasers that had used the threshing machines; the testimony tending

EVIDENCE—Continued.

to show similar conditions in other machines manufactured by defendant and returned as defective to the vendee. *Shoven v. J. L. Owens Co.*, 264.

2. Proof that machines manufactured by the defendant and returned to the sales agent on the ground that they were defective, had similar breakages and defects as machines which the purchasers testified, from use and observation, were so defective, raised a rebuttable inference or presumption that the common results were produced by a common cause. *Id.*
3. Evidence offered by the defendant from the books of the agency for the purpose of showing that it was customary in that business to take back machinery and charge it to a certain account, was rightly excluded as immaterial. *Id.* 265.
4. The testimony relating to the condition of machines returned to the selling agency was competent to show plaintiff's damages and was correctly received in evidence. *Id.*
5. Evidence based on the books of the defendant showing an itemized statement of expenditures for repairing breakages and rebuilding defective machines, corroborated by testimony of officers, employees, and shop men, showing items of expense for repairs and rebuilding of machines was also sufficiently definite and relevant to sustain plaintiff's claim. *Id.*
6. The books of a private bank showing the ownership of a note, which plaintiff claimed was not owned by the bank but by the payee, who had placed it in the bank for collection, were inadmissible in behalf of the defendant to sustain his contention that the bank had title to the note; defendant being part owner of the bank and having made the entry as cashier. It might not be admitted as a memorandum made by a third party, but was objectionable as hearsay. *Conroy v. Hafner*, 289.
7. Although it might be competent to show, on cross-examination of the plaintiff, that he had written or had failed to write to defendant relative to a certain matter, the question was incompetent if it called for the contents of the letter. *Id.*
8. It was not erroneous, in a personal injury action, instituted by an employee against his employer for injuries received when the freight elevator that carried him tipped up and caused the materials upon it to fall against him, to receive evidence of subsequent action of the elevator under operation, where, during the course of the trial, experiments were made in the presence of the jury to show the action of the machinery. *McGary v. Buick Motor Co.*, 345.
9. Although broad latitude may be permitted in the introduction of evidence in support of the charge of fraud, re-

EVIDENCE—Continued.

lating to matters that may throw light upon the question at issue, and an elastic discretion must necessarily be granted to the trial court in ruling upon the testimony offered, clearly incompetent or prejudicial testimony is no more permissible in this class of cases than in any other. *Bales v. Evans*, 383.

10. No error was presented by an assignment that the court erred in ruling out the records in a previous action for personal injuries in which plaintiff had recovered a judgment for injuries received in a railway accident, in no way connected, so far as the evidence disclosed, with the injuries for which he claimed damages. *Eberts v. Mt. Clemens Sugar Co.*, 452.
11. On the trial of an issue of breach of warranty that a furnace installed by plaintiff would properly heat a school-house in the coldest weather, plaintiff was entitled to introduce testimony tending to prove that other similar heating plants heated the buildings in which they were placed satisfactorily if they were properly operated. *Waterman-Waterbury Co. v. School District No. 2 of Wyoming Township*, 498.
12. The burden rests upon a defendant, in an action for the price of a furnace, to establish that the article failed to conform to the guaranty of plaintiff, who warranted that it would give satisfactory results, after it had been installed and accepted under the contract. *Id.* 499.
13. Plaintiff's attorney was correctly permitted to testify to his computations showing the probable earnings of deceased during his expectancy, reduced to the present worth, where the court fully and properly charged the jury relative to the value of this testimony and their duty. *Scott v. Boyne City, etc., R. Co.*, 515.

See APPEAL AND ERROR (8, 9); BANKS AND BANKING (1, 2); BILLS AND NOTES (2); CORPORATIONS (3-5); CRIMINAL LAW (1-4, 10, 12, 13); DAMAGES (2); DURESS (1); FRAUD (4); LARCENY; MASTER AND SERVANT (15, 22, 24, 26, 32); MORTGAGES (4-6); MUNICIPAL CORPORATIONS (8); NEGLIGENCE (6, 9); NEW TRIAL; REFORMATION OF INSTRUMENTS (4); TRIAL (5, 12); VENUE; WATERS AND WATERCOURSES (1); WILLS (6); WITNESSES.

EXCEPTIONS—See APPEAL AND ERROR (5, 6).

EXCEPTIONS BEFORE SENTENCE—See APPEAL AND ERROR (1).

EXCESSIVE DAMAGES—See MUNICIPAL CORPORATIONS (9).

EXCESSIVE SPEED—See CRIMINAL LAW (8).

EXCESSIVE VERDICT—See APPEAL AND ERROR (4); MASTER AND SERVANT (16).

EXECUTORS AND ADMINISTRATORS—See CONTEMPT (6).

EXEMPTIONS—See HOMESTEADS.

EXHIBITS—See APPEAL AND ERROR (3); TRIAL (10).

EXPERT TESTIMONY—See CRIMINAL LAW (3).

EXPLOSIONS—See MASTER AND SERVANT (17); TRIAL (9).

EXPRESS WARRANTY—See SALES (3).

FALSE IMPRISONMENT.

1. Although a warrant for selling intoxicating liquor in a county which has prohibited the traffic should be based on a complaint that states the name of the person or persons to whom the unlawful sales were made, and though such complaint is insufficient, upon direct attack, if the name of the purchaser is not stated, the process may be sufficient to protect an officer who arrests the offender, in an action of false imprisonment and malicious prosecution. *Brown v. Hadwin*, 491.
2. To protect an officer in making an arrest, the process must be fair upon its face; that is, it must apparently be lawfully issued and such that the officer might properly serve it; not necessarily that it appear to be perfectly regular and in most approved form. It must appear that the process proceeds from a court which had authority in law to issue process of that nature, that it is legal in form, and on its face contains nothing to apprise the officer that it was issued without authority. *Id.*
3. Where the complaint charged an offense which the justice could not try, the examination being held before him and the names of the persons to whom liquor was unlawfully furnished being liable to be disclosed so that the omission could be corrected in the information, the process was not absolutely void, and sufficiently protected the officer who arrested plaintiff. *Id.* 492.
4. Failure to sustain a complaint made on the information of the complaining witness, a sheriff, by introducing before the justice who entertained it the testimony of other witnesses who had knowledge of the facts, is fatal to the jurisdiction of the justice. *Id.*
5. A warrant reciting that witnesses had been examined before the justice of the peace who issued it, on its face justified the issuance of a warrant, and conferred jurisdiction even if the testimony of corroborating witnesses was not reduced to writing: the officer is not required to look behind his process or to examine the complaint or other preliminary process. *Id.*
6. The trial court did not err in refusing to submit to the jury the issue whether the sheriff had in his possession the warrant for defendant's arrest at the time he took

FALSE IMPRISONMENT—Continued.

the latter into custody, where the prosecuting attorney and sheriff both testified that the process was in the sheriff's hands and defendant could not swear positively to the contrary. *Id.*

See ASSAULT AND BATTERY; PLEADING (3).

FEDERAL JURISDICTION—See COURTS.

FELLOW-SERVANT—See MASTER AND SERVANT (12, 13, 18, 23, 25, 29, 30, 36, 40).

FIRE INSPECTION—See CONSTITUTIONAL LAW (2).

FITNESS OF MERCHANDISE—See SALES (3).

FLOWAGE—See WATERS AND WATERCOURSES (1).

FOOD STUFFS—See SALES (3).

FORCIBLE ENTRY AND DETAINER—See LANDLORD AND TENANT (2).

FORECLOSURE—See MORTGAGES (3).

FORMER VERDICT—See EVIDENCE (10).

FRATERNAL INSURANCE—See INSURANCE.

FRAUD.

1. A bill for a money judgment, based solely on averments of fraud, is demurrable on the ground that the complainant has an adequate remedy at law. *Reis v. Applebaum*, 582.
2. Where plaintiff's declaration alleged that she offered in October, 1909, to purchase stock of defendant corporation, which in the following March accepted her proposal, issuing certificates of stock as ordered, but in the meantime a reorganization took place and defendants knew that plaintiff expected and offered to subscribe for treasury stock, that shares of stock actually forwarded to plaintiff were not treasury stock but belonged to one of the officers of the company and the purchase price went to him instead of the corporation, that by the second or later plan of reorganization the corporate stock was rendered valueless, and that the financial condition of the defendant company had completely altered at that time, averring the knowledge and participation of the individual defendants, officers and directors of defendant, in the wrongful acts stated, plaintiff sufficiently set forth a cause of action for fraud and would be entitled to recover if the evidence substantiated the allegations of her pleading. *Chatfield v. Sintz-Wallin Co.*, 689.
3. The fact that she rescinded her contract of purchase by tendering back to the corporation the capital stock which was delivered to her, demanding back the purchase price,

FRAUD—Continued.

did not preclude plaintiff from bringing an action against the individual defendants. *Id.*

4. Conflicting evidence raising the issue whether or not plaintiff's husband was her agent, and had knowledge of the facts, which plaintiff claimed she did not know, was properly submitted to the consideration of the jury. *Id.* 690.

See EQUITY (3); EVIDENCE (9); INFANTS; JUDGMENT (1); SALES (2).

FRAUDS, STATUTE OF.

Where the parties to an alleged sale of potatoes did not include in their written correspondence sufficient evidence of the terms of their agreement to satisfy the statute of frauds, a later communication by telephone could not be relied upon as a sufficient acceptance of the terms proposed in their letters, so as to satisfy the statute of frauds. *Kraus v. Hansen*, 52.

FRAUDULENT CONVEYANCES—See ESCROWS (2).

FREIGHT RATES—See MANDAMUS (1).

FRUIT-STAND—See MUNICIPAL CORPORATIONS (2, 3).

GARNISHMENT.

Upon the disclosure of a garnishee that a debt owing by him was due to the principal defendant and another, as copartners, doing business under the name and style of Grand Haven Cement Company, which was interpleaded, the court finding that the fund belonged to the partnership, an order should have been entered awarding the fund to the copartnership, and the inquiry should have terminated. *Robbins v. Vandermeiden*, 674.

See PARTNERSHIP.

GOOD FAITH—See DAMAGES (2); REFORMATION OF INSTRUMENTS (8).

GROSS NEGLIGENCE—See CRIMINAL LAW (5, 8, 9).

GUARDS—See MASTER AND SERVANT (35, 36).

HEARSAY—See EVIDENCE (1, 6, 7).

HIGHWAYS AND STREETS.

1. The jury in eminent domain proceedings, on appeal from a verdict and award for taking appellant's property for a highway, has authority under the statute (Act No. 283, Pub. Acts 1909; 1 How. Stat. [2d Ed.] § 2173 *et seq.*), to determine disputed boundaries involved in the taking of a part of the lands, where a controversy arises out of a disagreement as to the location of the section line by the surveyors. *Letourneau v. Erickson*, 617.

HIGHWAYS AND STREETS—Continued.

2. Where the question of locating the correct section line at one end was in dispute, and was properly raised in the court below, appellant was entitled to have the issue tried by the jury, and settled, before steps were taken to open and improve the highway. *Id.*

See EMINENT DOMAIN; MUNICIPAL CORPORATIONS (1-3, 10); NEGLIGENCE 1-3, 5); NUISANCE (1); TELEGRAPHS AND TELEPHONES.

HOLDER IN DUE COURSE—See **BILLS AND NOTES** (1).

HOME RULE ACT—See **CONSTITUTIONAL LAW** (4).

HOMESTEADS.

The homestead of an unmarried man ceases to be exempt at his death: the statute creates such exemption only in favor of the widow or minor children of a decedent. *Brown v. Keiser*, 432.

See **MORTGAGES** (1).

HOMICIDE—See **CRIMINAL LAW** (4).

HUSBAND AND WIFE.

1. A married woman may convey her property in payment of or as security for, her husband's debt, and such contract is sustained by sufficient consideration. *Lewis v. Doyle*, 142.
2. A wife's conveyance of real property owned by herself and husband by the entirety, to secure or to pay an indebtedness of the husband, is supported by a sufficient consideration and is valid. *Ehle v. Looker*, 249.
3. And the instrument was a mortgage as to both defendants, not a deed as to one of them, and mortgage as to the other. *Id.*

See **DURESS** (2); **EQUITY** (1); **MORTGAGES** (1, 2).

ICE AND SNOW—See **MASTER AND SERVANT** (44).

IMPLIED WARRANTY—See **SALES** (3).

IMPROVEMENTS—See **TAXATION** (8).

INADEQUACY OF PURCHASE PRICE—See **EQUITY** (3).

INCOMPETENCY OF SERVANT—See **MASTER AND SERVANT** (23-25).

INCONSISTENT VERDICT—See **EMINENT DOMAIN** (1).

INCUMBRANCES—See **REFORMATION OF INSTRUMENTS** (8).

INDEX—See **APPEAL AND ERROR** (3).

INDUSTRIAL ACCIDENT BOARD—See MASTER AND SERVANT (1, 2, 6-8).

INFANTS.

1. Before reaching majority, for fraud in the inception of the contract, a minor may rescind the purchase of a horse which proved to be vicious. *Patterson v. Kasper*, 281.
2. Notwithstanding that defendant was likewise an infant and his tort may have arisen out of a contract that he has fraudulently induced the plaintiff to enter into, an action might be maintained in assumpsit to recover back the price paid for a horse, plaintiff having elected to rescind and return the animal to the vendor. *Id.*

See JUDGMENT (1); RAILROADS (6-8).

INFERENCES—See LARCENY.

INJUNCTION.

1. An injunction bill lies to restrain the erection of a permanent structure upon a right of way. *Longton v. Stedman*, 406.
2. The fact that defendant's damages in removing a portion of the building would be large and complainants' loss or injury would be small, would not prevent the enforcement of the equitable remedy. *Id.*

See CONTEMPT (6); EASEMENTS (1); WATERS AND WATER-COURSES.

INSPECTION—See MASTER AND SERVANT (13, 17, 18, 20).

INSPECTORS—See NEGLIGENCE (6).

INSTRUCTIONS—See BILLS AND NOTES (1); CARRIERS (2); CRIMINAL LAW (5, 11); EVIDENCE (13); MASTER AND SERVANT (21); MUNICIPAL CORPORATIONS (7); TRIAL (3, 8, 11).

INSURANCE.

Plaintiff was wife of a member of defendant fraternal insurance association, who, during his lifetime, received a certificate of membership wherein he agreed that amendments might be made from time to time in relation to the constitution and laws of the order fixing the premiums and rate of assessments, and should become a part of the contract. The defendant association was organized under the laws of the Dominion of Canada. Fifteen years after the issuance of this certificate the defendant accepted a new charter from the parliament of Canada, changing the name of the association and authorizing it to make a charge or assessment against policies issued prior to 1899 and affecting the policy of decedent. The assessment was proportional to a valuation deficiency existing as to this class of policies, which were paying less than the cost of insurance. *Held*, that the charge or assessment was

INSURANCE—Continued.

not against public policy, or contrary to the vested rights of insured. *De Graw v. Supreme Court, I. O. F.*, 366.

INTENT—See CORPORATIONS (5); CRIMINAL LAW (9); REFORMATION OF INSTRUMENTS (7); WILLS (4, 7, 8).

INTEREST—See DAMAGES.

INTERPLEADER—See GARNISHMENT.

INTERPRETATION OF WILLS—See WILLS (5, 7, 8).

INTIMIDATION—See CORPORATIONS (8).

INTOXICATING LIQUORS.

1. It is the duty of the board or council to which the approval of liquor bonds has been delegated by statute, to determine in good faith whether the applicant has offered a bond sufficient in form and amount, and, if so, to approve it, although, in certain cases, the bonds of a surety company may be rejected if not satisfactory. *Price v. Oakland Twp. Board*, 217.
2. In so far as Act No. 170, Pub. Acts 1911 (2 How. Stat. [2d Ed.] § 5062), attempts to confer authority on such board to reject sufficient bonds offered by retail liquor dealers, the effect of the act is to authorize prohibition and is beyond the scope of the title of the amended statute which, in terms, provides for the regulation and taxation of the business, not its prohibition. *Id.*
3. Under section 29 of Act No. 107, Pub. Acts 1909 (2 How. Stat. [2d Ed.] § 5044), wherein the requisites are set forth for issuance of search warrants, authorizing the seizure of intoxicating liquors unlawfully stored and concealed, an affidavit for such warrant, which does not allege in the language of the statute that the liquors are concealed in the place named therein, does not comply with the law, and the warrant afforded no protection to the sheriff in seizing liquors which were stored for sale in a county that had adopted prohibition. *Bullock v. Ward*, 443.
4. Townships have no authority to suppress the liquor traffic by ordinance. *Gable v. Township Board of Three Oaks*, 659.
5. It is not within the authority of a township board to reject a bond offered by a retail liquor dealer who applies for a license, on the ground that the instrument is signed by a surety company, without reference to the legal sufficiency of the bond or an investigation as to the actual responsibility of such surety. *Id.*
6. Only the township, ward or village in which the applicant proposes to do business need be stated in the application: any additional information, whether correctly given or not, should be treated as surplusage. Act No. 291, Pub. Acts 1909 (3 How. Stat. [2d Ed.] § 5058). *Id.*

INTOXICATING LIQUORS—Continued.

7. However, the rule is different as to the bond, which must distinctly describe the locality and place where he proposes to establish the business, and the lot or building and location must be exactly stated so as to distinguish it from any other and prevent the licensee from moving without securing permission of the township or other authorities. *Id.*
8. Although application and bond may be considered and approved at the same meeting, and are sometimes passed upon together, the application should be considered first. And while the rejection of the bond may have been warranted because it failed to state, with sufficient particularity, the place where relator intended to conduct his saloon, mandamus will issue to compel respondent to convene and approve a proper application. *Id.*

See FALSE IMPRISONMENT (1-3); MUNICIPAL CORPORATIONS (6).

INTOXICATION—See DEEDS (2, 3).

JOINDER OF TORT AND ASSUMPSIT—See PLEADING (2).

JUDGES—See CONTEMPT (4).

JUDGMENT.

1. Where complainant filed a bill in equity to set aside a judgment which by consent had been entered in his favor against defendant in justice's court, averring that he had been induced by the fraudulent representations of the physician of an insurance company which protected defendant against injuries occurring to its employees, to compromise his claim for personal injuries for an inadequate amount, and where the trial court, after hearing the proofs, denied the relief prayed for, on the ground that fraud had not been established, the court, on appeal, will not determine the case on the theory that complainant was an infant and had repudiated the compromise before he became of age, unless it can determine from the record that an injustice has been done and that the contract was induced by fraud or unconscionable methods. *Barr v. Packard Motor Car Co.*, 612.
2. The exercise of equitable jurisdiction to set aside a judgment is rarely exercised, and then, only when it is made clearly to appear that an injustice has been done. *Id.*

See RECEIVERS (3).

JUDGMENT, NECESSITY FOR—See APPEAL AND ERROR (1).

JUDICIAL NOTICE—See CRIMINAL LAW (13); VENUE.

JURISDICTION—See EQUITY (1); FALSE IMPRISONMENT (2, 3, 5); LANDLORD AND TENANT (2).

JURY.

1. Under Act No. 367, Local Acts 1895, creating a board of jury commissioners for the county of Macomb, providing for an annual meeting on the first Monday of May in each year, and that the panel for the jury shall be selected from the assessment roll of the preceding year, the trial court was right in overruling a challenge to the array of jurors, charging that the commissioners used the assessment rolls for another year, and did not select the names from the roll of the preceding year, when the evidence showed that the assessment rolls for the year in question were not completed, and the jury commissioners had the rolls of the preceding year, as required by the statute. *Eberts v. Mt. Clemens Sugar Co.*, 450.
2. No sufficient ground of challenge was proved, because defendant charged that the commissioners drew only nine names of jurors from one township instead of ten from each, as provided by the local act affecting Macomb county, where its attorneys did not exercise any of its peremptory challenges and from the township which defendant referred to only two jurors were drawn on the panel. *Id.*

See CONTEMPT (2); TRIAL (2, 10).

JURY COMMISSION—See JURY (1, 2).

JUSTICES OF THE PEACE—See CERTIORARI; FALSE IMPRISONMENT (4); VENUE.

JUSTIFICATION—See FALSE IMPRISONMENT (4).

LACHES—See EQUITY (4-6); SALES (4).

LANDLORD AND TENANT.

1. The tenant being estopped to dispute his landlord's title, unless a change has occurred in interest subsequent to the making of the lease, in summary proceedings for the possession of a house and premises occupied by the defendant, such tenant was estopped to set up a change of title, arising from a tax sale of the leased property, by virtue of which title had vested in the purchaser at the time the premises were rented. *Balch v. Radford*, 292.
2. It is not a defense which ousts the circuit court commissioner of jurisdiction of summary proceedings for the possession of real property, that prior to the making of a lease, the title of the landlord has been divested by sale of the property for city taxes. *Id.* 293.

See MUNICIPAL CORPORATIONS (4); NEGLIGENCE (7-9); REFORMATION OF INSTRUMENTS (2).

LARCENY.

Testimony in a larceny case that the hog which respondent was accused of having stolen weighed 137 pounds and had been sold for about 10 cents a pound, sufficiently

LARCENY—Continued.

tended to prove the value of the animal and sustained a conviction of the charge: evidence as to value might properly be of an inferential character. *People v. Grimm*, 643.

LEAD POISONING, NOT AN ACCIDENT—See MASTER AND SERVANT (6).

LEASE—See REFORMATION OF INSTRUMENTS (1, 3, 5, 6, 8).

LEGISLATIVE QUESTION—See RAILROADS (2).

LETTERS—See BANKS AND BANKING.

LICENSE—See CARRIERS (4); INTOXICATING LIQUORS (1, 4-8).

LIFE INSURANCE—See INSURANCE.

LIFE TENANT—See REFORMATION OF INSTRUMENTS (3, 5).

LIGHT AND AIR—See EASEMENTS (3).

LIMITATION OF ACTIONS.

Under a contract of purchase of certain shares of stock to be redeemed at par on 30 days' notice, the right of action for failure to so redeem accrued when a demand in writing was made on the seller to redeem the shares, and was barred by the statute of limitations within six years of the date when the demand was made, not from the date when plaintiff afterwards formally tendered the stock to the defendant. *Weaver v. Collins*, 255.

LIQUIDATED DAMAGES—See ARBITRATION AND AWARD.

LIQUOR BOND—See INTOXICATING LIQUORS (1, 5, 7, 8).

LOCAL ACTS—See CONSTITUTIONAL LAW (2, 3).

LOGGING ROAD—See RAILROADS (4).

LOGS AND LOGGING—See MASTER AND SERVANT (30); TAXATION (9, 10).

LOST DRAFT—See BANKS AND BANKING (1).

MAJORITY OF VOTES—See ELECTIONS.

MALICIOUS PROSECUTION—See FALSE IMPRISONMENT (1).

MANDAMUS.

1. Mandamus is the appropriate remedy to compel the Detroit & Mackinac Railway Company to comply with an order of the Michigan railroad commission fixing rates for the transportation of timber and logs over certain branches of the respondent. *Michigan Railroad Commission v. Detroit & Mackinac R. Co.*, 234.
2. The effect of another suit pending, involving similar ques-

MANDAMUS—Continued.

tions, is usually to prevent the issuance of the writ of mandamus, unless the suit will be ineffective or the court in which it is instituted is without jurisdiction. *Id.*

See INTOXICATING LIQUORS (8); RAILROADS (1, 3).

MANSLAUGHTER—See CRIMINAL LAW (4-6, 9).

MARRIED WOMEN—See DURESS (2, 4); HUSBAND AND WIFE (1); MORTGAGES (1); TRIAL (4).

MASTER AND SERVANT.

1. Where a section hand was killed while he was returning home at noon for dinner, being struck by a passing train, the burden rested on his representatives to show, in proceedings before the accident board, that death resulted from an accident arising out of and in the course of his employment. *Hills v. Blair*, 20.
2. Findings of the industrial accident board which are supported by facts or inferences from the testimony must be taken as true on certiorari. *Id.*
3. Accidents to employees in the act of going to or from their work are not usually regarded as arising out of the employment or in the course thereof. *Id.*
4. The fact that decedent was still on the premises of his master, at a considerable distance from the place at which his work was done, did not bring him within the exception to the rule which has been recognized in certain cases when the servant was so near the place of his employment as in effect to be within the protection of the law. *Id.*
5. Where it appeared from the evidence that defendant's servants punished plaintiff's horse with a stick six or seven feet long and two inches in diameter and struck her on another occasion with a cant hook, and again with a log chain, not because of vicious conduct on the part of the animal, but because of the fact that she was slow and they wanted to expedite the work, the tort was not committed out of the line of the servant's employment and the defendant was liable and could not avoid responsibility, on the theory that the wrong was wilful and intentional and not within the scope of the servant's authority. *Pesola v. Forsten*, 95.
6. Under the provisions of the workmen's compensation act, no recovery may be allowed for occupational diseases such as lead poisoning, which, being gradually acquired, is outside the scope of the requirement that notice is to be given within ten days after an accident, and of the title and terms of the statute as to compensating accidental injuries. Act No. 10, Pub. Acts Extra Session 1912 (2 How. Stat. [2d Ed.] § 3939 *et seq.*). *Adams v. Acme White Lead & Color Works*, 157.

MASTER AND SERVANT—Continued.

7. If the act was intended to include such occupational diseases, the title was not broad enough to express that object within Art. 5, § 21, of the Constitution. *Id.*
8. Act No. 10, Extra Session 1912, providing compensation for injuries to employees, or for their death in the course of their employment (2 How. Stat. [2d Ed.] § 3939 *et seq.*), is in derogation of the common law and should be strictly construed, although it is a remedial statute and creates a right against one who would not otherwise be liable. *Andrejwski v. Wolverine Coal Co.*, 298.
9. Where a servant has worked in his employment for practically the whole year preceding his injury, his average annual earnings are known or ascertainable and the average weekly wages are to be determined by finding one fifty-second of the annual earnings. *Id.*
10. If the workman has not been employed during substantially the entire year, but his daily wage or salary is fixed, or known, his average earnings as a basis of compensation will be 300 times the daily wage or salary. In case his employment has been limited in term, or there is insufficient data from which to determine his annual earnings, they are to be determined by taking 300 times his daily wage or salary, or the daily wage of similar workmen in like employment. *Id.*
11. Decedent worked in a coal mine in the Saginaw valley. The employment was not continuous, but operations were carried on for an average of 211 days in a year. Payment was fixed by contract on the basis of the number of tons produced, and the amount that each miner received depended on the coal which was sent up on his number. During the year which preceded the death of deceased, the mine in which he was employed was operated 148 days, and he received \$507.45. While the mine was not in operation, he worked as a cement block layer for another employer, earning nearly the same amount of wages. *Held*, that the first three classes mentioned under section 11 of the compensation act were intended to include workmen who were employed during substantially the whole year prior to the accident, and that it would not be reasonable or fair to apply such methods of compensation to the case of deceased, and that the average annual earnings should be computed on the basis of the average for the preceding eight years, as provided by the fourth classification under this section of the law. *Id.*
12. A car repairer could not recover for alleged negligence of the railroad company in failing to enforce a rule to protect its employees while they were engaged in work on a car by displaying a blue flag on the car by day or blue lights by night, where it appeared from the opening statement of his attorney and from his testimony, given at a former trial, that he did not rely on the enforcement of

MASTER AND SERVANT—Continued.

such rule, but did reply on the promise of a superior fellow-servant to send a man to protect him, and that the accident occurred because of a failure to carry out the promise of protection. *Garlinghouse v. Michigan Central R. Co.*, 311.

13. A member of a loading crew who was killed because a car-load of timber was insufficiently or improperly wired by other members of the gang, was not entitled to recover for the neglect of his coemployees, in the absence of testimony to prove that the car was not properly inspected, or that due inspection would have disclosed a defect in the wiring or loading. *Van Auken v. Michigan Central R. Co.*, 331.
14. Evidence tending to show that defendant's elevator had a broken shoe or guide which permitted the platform to tilt and throw the freight against plaintiff, *held*, to present a question for the jury as to alleged negligence of the employer. *McGary v. Buick Motor Co.*, 345.
15. Evidence that plaintiff, who claimed to be in defendant's employ in the engine room of a ferry boat, was ordered to make the boat fast to the dock, and in doing so he was caught by the cable, and, as defendant contended, because of the ordinary tightening of the same, he was struck and injured, plaintiff testifying that the accident was caused by the starting of the engines before he had time to get out of the way, *held*, to present issues of fact for the jury as to the existence of the relation of master and servant and the claim of negligence. *Stetson v. Mackinac Transportation Co.*, 355.
16. *Held*, also, that \$5,000 was not an excessive verdict for the paralysis and substantial loss of use of plaintiff's leg, accompanied by severe pain; his earnings having amounted to \$45 per month and board, plaintiff being about 34 years of age. *Id.*
17. Plaintiff's declaration, alleging that he was injured, while he was in the employ of defendant, from an explosion of its boiler; that for a period of ten years the boiler had not been properly inspected; that excessive heat had been applied to the plates of the boiler, causing them to bulge and strain; that the boiler had become unsafe from use and overheating; that it was defendant's duty not to subject the boilers in its factory to excessive heat; and that the duty rested on defendant to inspect, etc., was not demurrable for the reason that the declaration did not allege that the boiler was imperfectly constructed or of improper material. *Eberts v. Mt. Clemens Sugar Co.*, 449.
18. The duty to inspect a boiler or other machinery cannot be delegated by the master so as to escape liability by virtue of the fellow-servant rule. *Id.* 450.
19. Where the declaration averred that the defects in the boiler

MASTER AND SERVANT—Continued.

- were unknown to plaintiff, and that he exercised due care and caution, the demurrer of defendant, which set up the objection that the plaintiff was shown to be chargeable with contributory negligence, was properly overruled. *Id.*
20. And evidence supporting the averments of plaintiff's declaration as to overheating the rear stay plates and loosening the bolts, also, as to failure to inspect the boiler, presented an issue for the jury. *Id.*
21. Nor did the trial court err in charging the jury that the plaintiff's right to recover depended largely on two essential facts: (1) Had the stay sheet and connecting stay bolts of the boiler become so defective as to make the boiler more dangerous than one in reasonably good repair? (2) If so, did the servant in charge have actual or constructive notice of the condition? *Id.* 451.
22. Also, it was proper to charge that if the jury found plaintiff's injuries to be permanent, they should award to him a sufficient sum of money to compensate him for loss of the ability to earn a livelihood, not exceeding the period of his expectancy; plaintiff's proofs tending to show that his injuries were of a permanent character. *Id.*
23. Evidence that plaintiff's fellow-servant behaved like a boy, smoked cigarettes, was inattentive to his work and engaged in joking and talking, did not establish incompetency to do unskilled labor; and the employer was not required by law to give instructions or inquire into the experience or competency of men to do that kind of work. *Jackson v. Schillinger Bros. Co.*, 504.
24. Nor did a warning by one of the workmen to defendant's foreman that there would be an accident if he retained the inattentive employee, not stating his reasons or specifying why he considered the laborer incompetent, put the employer upon notice of the alleged incompetency. *Id.*
25. And where plaintiff had worked for upwards of two days within ten feet of the fellow-servant, without observing anything to indicate incompetency, he must be held to have had equal knowledge of the facts with the employer, and was chargeable with the assumption of the risk of the negligence of his coemployee. *Id.*
26. Upon the second trial of a negligence case, in which it was claimed that the manner of decedent's death was matter of conjecture, and that the jury should not have been permitted to guess or speculate as to the contention that decedent caught his foot in defective blocking in defendant's tracks, evidence not offered on the first trial and tending to prove that there was only one place in which decedent could have caught his foot near the point of the road where the accident took place, presented a question of fact for the jury. *Scott v. Railroad Co.*, 169 Mich.

MASTER AND SERVANT—Continued.

265 (135 N. W. 110), distinguished. *Scott v. Boyne City, etc., R. Co.*, 514.

27. When the circumstances disclosed by the evidence justify inferences that are sufficient to remove the cause of accident from the field of conjecture to that of probability, it should be left to the jury to draw the proper inference. *Id.*
28. And testimony that the deceased would have got on the train in safety if his foot had not caught in the blocking, and where there was no proof tending to show that his attention had been or ought to have been directed to the faulty condition of the blocking, he was entitled to assume that the defendant had performed its duty and had conformed to the requirements of law, and it could not be held, as matter of law, that decedent was chargeable with negligence. *Id.*
29. Employees of a lumbering corporation who were engaged in preparing the roads and keeping them in proper condition, sanding the track on the declivities and shoveling off snow when it was necessary, were not fellow-servants with teamsters who drove logs over the roads. *Scoop v. W. H. White Co.*, 539.
30. Employees whose duty it is to prepare and keep a safe place for other servants perform an unassignable duty of the master. *Id.*
31. And where the lumbering company employed special servants to prepare the logging roads, and assumed the obligation of keeping the roads in safe condition, the teamsters not being required to leave their teams and precede the loads over hills and steep places to ascertain if conditions were safe for passage, but where the road men were expected to call to teamsters and notify them whether they could safely pass over the way prepared and sanded for their use, the teamsters were entitled to rely on the presumption that the master had performed its duty of keeping the place safe for use. *Id.*
32. The competency or incompetency of such road men was not material except as it might throw light on the issue whether they had properly performed their duty. *Id.* 540.
33. Plaintiff did not assume the risks of driving logs down an incline covered with snow, which both master and servant knew must be prepared by shoveling and sanding to make it reasonably safe: having received the customary notice that the work had been done upon calling to the road man, he did not assume the risk of the master's failure to properly sand the track. *Id.*
34. Evidence tending to show that plaintiff was injured because one of the hills on the logging road had not been sufficiently sanded, and that a team could not guide a

MASTER AND SERVANT—Continued.

- load of the size which plaintiff was driving down a hill as steep as this one if the sand had been freshly covered with snow, with evidence pro and con upon the claim of defendant that plaintiff was driving at an excessive rate of speed and the accident was due to plaintiff's negligence, *held*, to present issues for the jury as to his alleged contributory negligence and assumption of risk. *Id.*
35. Where the superintendent of a factory ordered an employee to chip pieces out of certain cast-iron frames, and the chips tended to fly into an adjoining passageway employed by plaintiff who worked in other departments under a different superintendent, defendant was liable for the failure to erect a screen or other protection. *Webb v. Buick Motor Co.*, 551.
36. A superintendent of the construction department of an extensive automobile factory, who was subject only to the authority of the defendant, and whose duties were to plan and supervise the construction work in all parts of the establishment, and do the work by his subordinates, having under him an assistant and foreman, was not a fellow-servant with an employee in the stock department, who was injured by the superintendent's neglect to use a guard or screen to prevent flying chips; for the duty which was violated was a duty which the master might not delegate so as to escape liability. His knowledge of surrounding conditions was chargeable to the employer. *Id.* 552.
37. Nor is the doctrine of safe place made inapplicable because the work of chipping frames was temporary: defendant's duty required the maintenance of a safe passageway for plaintiff in the ordinary scope of his employment. *Id.*
38. The court could not hold, as matter of law, that the accident was one which defendant need not have anticipated, when it was clear that the chips were liable to fly and strike some of the servants of the defendants. *Id.*
39. And the rule of assumed risk did not bar plaintiff's recovery where new dangers were created by the employer of which plaintiff had no notice or knowledge, unless the dangers were shown to have been such that it was negligent on plaintiff's part not to have seen and avoided them. *Id.*
40. Trammers in a mine who with the miners prepare a part of the drift or other portion of the mine, which has been newly blasted, for the timbermen to place supports, are fellow-servants with miners, all being engaged in creating or constructing a safe place to work; so that neglect of the miners to properly sound and bar down the unsafe rock was the act of fellow-servants of a trammer who was engaged in work in an untimbered portion of the drift. *Koskell v. Newport Mining Co.*, 586.
41. Upon plaintiff's testimony that the miners did not trim

MASTER AND SERVANT—Continued.

down or sound the place at all, he must be held to have known and assumed the risk of the failure to perform that duty, although one of the miners assured him that the place was safe. *Id.*

42. Where plaintiff and his fellow-servants were employed in raising the supports for a tramway, and the master had provided a derrick to be used in raising the supports, but the workmen used pike poles instead and the timbers slipping from their control fell upon plaintiff, the master was not liable, and a verdict was properly directed for defendant on the ground that, having provided the appropriate appliances and pointed out a safe method of performing the work, the employer had performed his duty. *Poirier v. Bartlett Lumber Co.*, 678.

43. Nor was there any room for the claim that the employer was negligent in failing to warn plaintiff of the danger, in the absence of evidence that the defendant or some person in the relation of *alter ego* knew of the workmen doing the work in the manner charged, or that they would be liable to do it in that way. *Id.*

44. Nor was the defendant liable for failing to provide a safe place to work, where plaintiff claimed he slipped on ice which was covered with snow, and was unable to escape from under the descending timber; accumulations of ice due to normal weather conditions being known to plaintiff and his coemployees, and the danger being obvious. *Id.*

See ACCIDENT; EVIDENCE (8).

MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED AGENT—See WITNESSES (1).

MERGER—See REFORMATION OF INSTRUMENTS (7).

MICHIGAN RAILROAD COMMISSION—See MANDAMUS (1); RAILROADS (1).

MINES AND MINING—See MASTER AND SERVANT (11, 40, 41).

MINORS—See INFANTS.

MISJOINDER—See PLEADING (2).

MISTAKE—See REFORMATION OF INSTRUMENTS (1, 2).

MISUSE OF COURTS AND PROCESS—See CORPORATIONS (8).

MONOPOLIES—See CORPORATIONS (1-6, 9, 10).

MORTALITY TABLES—See EVIDENCE (13).

MORTGAGES.

1. A deed given by a married woman to enable her husband to borrow money, conveying the homestead occupied by

MORTGAGES—Continued.

- both, was valid and enforceable, as a mortgage between the parties to the instrument, although the acknowledgment of the wife was irregularly taken by a justice of the peace, who testified that he signed the acknowledgment on the strength of a note, received from the wife, requesting him to acknowledge it as her free act and deed. *Ehle v. Looker*, 248.
2. As to a grantee who has loaned money to the husband, relying upon the deed, the wife was estopped to deny the validity of the execution and delivery of the conveyance, which she testified that she signed without knowing what the paper was, and, also, that it had been her habit to sign papers which her husband presented to her to sign. *Id.* 249.
 3. Upon an appeal from a decree discharging a mortgage on complainant's farm, as paid, and on review of the evidence and issues of fact, the decree of the trial court is affirmed as warranted by the evidence. *Williams v. Hammond*, 285.
 4. A deed may be shown by parol to have been intended as a mortgage. *Mintz v. Soule*, 564.
 5. In passing upon the proofs in such cases, courts favor written evidence over oral testimony, but are required to consider the relations of the parties, surrounding circumstances, and gather therefrom, if possible, the real intent of the parties. *Id.*
 6. Evidence held to warrant the trial court in determining upon pleadings and proofs that a deed and contract back to the vendor did not amount to a mortgage. *Id.*

See EQUITY (2); HUSBAND AND WIFE (3).

MOTIONS—See NEW TRIAL.

MOTOR VEHICLE LAW—See CRIMINAL LAW (4, 6).

MOVIES—See CONSTITUTIONAL LAW (2).

MUNICIPAL CORPORATIONS.

1. Act No. 46, Pub. Acts 1907 (5 How. Stat. [2d Ed.] §§ 14133, 14134), enacting that rights by prescription might not be thereafter obtained in public streets, changed the pre-existing rule in Michigan and brought the law into conformity with the general rule recognized by the weight of authority. *Pastorino v. City of Detroit*, 5.
2. The word "fruit-stand" signifies a place where fruit is sold at retail—a place where the business is conducted, the pursuit being closely related to hawking: the business of one who sells or offers goods for sale on the public street, by outcry or by exposing the wares, or by placards, labels, signals, etc. *Id.*
3. A fruit-stand maintained in a street of the city of Detroit

MUNICIPAL CORPORATIONS—Continued.

without permission and in violation of a municipal ordinance prohibiting persons from obstructing or incumbering streets and other public places with buildings, boxes and like objects, was an encroachment and constituted a public nuisance. *Id.*

4. While adverse title may be acquired through possession held by a tenant, the party claiming prescriptive title must show a disseisin and unequivocal assertion of title in himself as against the original holder of the title; and as bearing upon the adjacent owner's claim of right to part of a public street in support of his title, it is important to ascertain whether any notice was ever given to the municipality of the alleged claim. *Id.* 6.
5. It is competent for any member of the township board to act as presiding officer, and in the absence of the supervisor one of the justices of the peace who has been called in as provided by 3 Comp. Laws, § 2344 (1 How. Stat. [2d Ed.] § 1401), may preside, and has the same authority as other members of the board. *Price v. Oakland Twp. Board*, 216.
6. The presiding member of the township board who has voted once upon an application for approval of a liquor bond may not cast an additional vote in the case of a tie, thereby disapproving the bond of the applicant; a double vote not being authorized by the statute. *Id.*
7. In an action by a city against a corporation consumer of water, which had tapped the mains and diverted water around the meter without paying for it, evidence tending to show that sham or wrongful devices were installed for the purpose of taking defendant's water without metering it, and to conceal the true state of facts, justified the charge of the trial court that if defendant secured water without charge by this means, it was liable even if its officers, directors, and stockholders did not know of the wrongful use. *City of Kalamazoo v. Standard Paper Co.*, 477.
8. Where it was uncertain how much water had been illegally taken from the municipal mains, and the plaintiff claimed the value of the whole amount which its evidence showed could have been taken or converted, the want of certainty in the element of damages was attributable to the defendant's fault, and although defendant claimed that such an amount could not have been diverted, the defendant corporation was liable for the full value of the property at the time of conversion, with interest to the date of judgment. *Id.*
9. Damages amounting to \$15,840 held, to be warranted by plaintiff's evidence. *Id.* 478.
10. Evidence that decedent drove his vehicle and team around a washed out culvert and across a temporary bridge erected

MUNICIPAL CORPORATIONS—Continued.

by the township, that in returning to the highway he attempted to drive across an open ditch partly filled with water, that he made no effort to ascertain whether the way was a safe one, and that a vehicle which preceded him at the same place in plain view encountered difficulty in crossing the ditch, and that the occupants were partly thrown out and partly jumped from the buggy, *held*, to warrant the trial court in directing a verdict for defendant township on the ground of contributory negligence, there being no invitation or direction to cross the ditch at the point selected by decedent. *Hayden v. Township of Bangor*, 601.

See CONSTITUTIONAL LAW (1, 3); ELECTIONS; INTOXICATING LIQUORS (4); NEGLIGENCE (1, 5); NUISANCE (2); PLEADING (2).

MUTUALITY—See REFORMATION OF INSTRUMENTS (1).

NAMES—See PARTNERSHIP.

NEGLECTANCE.

1. In an action for personal injuries resulting from a sign falling upon the sidewalk in a city street, and striking plaintiff, it was error to direct a verdict for the defendant, owner of the sign, on the ground that he employed an independent contractor, who was reputable and competent, to suspend the sign. *Hass v. Booth*, 173.
2. Pedestrians upon the street have the right to absolute safety while exercising ordinary care and prudence: sign boards or other projections or encroachments so situated that if they fall they may do injury to travelers are nuisances unless so secured as to be perfectly safe; the person maintaining them is liable for all injuries arising from the falling of such obstruction except in cases of inevitable accident. *Id.*
3. It has frequently been held that any encroachment upon a street, either on or above the surface, of a permanent nature, which endangers or interferes with its use, is a public nuisance. *Id.*
4. Where plaintiff's attorney did not contend that the owner of the sign must maintain it at his peril in an absolutely safe condition, but took the ground that he was chargeable with a very high degree of care, the court should have submitted the question to the jury on that theory of negligence. *Id.*
5. The duty of the defendant was not lessened by the alleged fact that he had secured the right to maintain the structure in or above the street for advertising purposes from the city council, or by the possibility that the municipality through failure to cause the removal of the nuisance might be held liable. *Id.*

NEGLECT—Continued.

6. The certificate of the inspector from the department of building that the sign had been inspected, unsupported by proof that the inspection was adequately or carefully made, or that the defect in the sign was latent, did not establish a defense to the action; plaintiff's evidence tending to show that seven months had elapsed and no one had inspected the sign, presented an issue of fact for the jury. *Id.* 174.
7. In an action for negligent use of water and permitting the apparatus in a toilet room to overflow, injuring the goods of a tenant occupying the lower part of the same building with defendant, who leased the second floor, evidence tending to show improper use and carelessness in depositing foreign material in the closet, *held*, to raise an issue for the jury, and *held*, that the court erred in failing to consider the duty of defendant to employ care in the use of the apparatus which had overflowed at other times within his knowledge. *Waidelich v. Andros*, 374.
8. While defendant was not an insurer, a high degree of care rested upon the tenants having control of the water supply in the upper part of a store building to employ active and constant precaution against the danger of an overflow. *Id.*
9. To make a *prima facie* case of defendant's negligence, it was incumbent upon plaintiff to prove an injury from an unusual occurrence of such a nature as to indicate defendant's negligence and such facts in relation to the occurrence indicating negligence as were reasonably in his power to establish. *Id.*
10. Plaintiff, whose declaration charged other negligence besides depositing foreign or bulky material in the bowl, was not deprived of his right to insist on the other negligent conduct so charged, by reason of attempting unsuccessfully to show the exact cause. Nor did he lose his right to base the claim of negligence on the presumption to which the accident gave rise of negligent conduct. *Id.*

See ACCIDENT; BAILMENTS; CARRIERS (1-3); CRIMINAL LAW (5-9); EVIDENCE (8); MASTER AND SERVANT (5, 12-21, 23-44); MUNICIPAL CORPORATIONS (10); RAILROADS (6, 9).

NEWSPAPERS—See CONTEMPT (3).

NEW TRIAL.

Although the trial judge expressed his views, in denying a motion for a new trial, that he would have determined the case in a different manner than the jury decided it, and that he did not believe that any negligence was made out, the Supreme Court will not reverse his ruling denying defendant's motion for a new trial, unless the verdict is against the overwhelming weight of the evidence. *McGary v. Buick Motor Co.*, 345.

See APPEAL AND ERROR (4, 7); MASTER AND SERVANT (16).

NEXT OF KIN—See WILLS (2, 3).

NONDELEGABLE DUTIES—See MASTER AND SERVANT (18).

NOTICE—See EQUITY (5); FRAUD (4); MASTER AND SERVANT (21, 23, 24, 39, 43, 44); NEGLIGENCE (7); NUISANCE (2); RAILROADS (9); REFORMATION OF INSTRUMENTS (8); TAXATION (1-6, 9); VENDOR AND PURCHASER.

NUISANCE.

1. A fruit-stand upon a public highway is not in its nature such a permanent obstruction that rights of prescription can be based upon its maintenance. *Pastorino v. City of Detroit*, 6.
2. Such a structure on the sidewalk is a nuisance which may be abated after proper notice, and the objectionable object may be summarily removed from the street. *Id.*

See MUNICIPAL CORPORATIONS (3); NEGLIGENCE (2, 3, 5).

OCCUPATIONAL DISEASE—See MASTER AND SERVANT (6, 7).

OFFER AND ACCEPTANCE—See SALES (1).

OPINION EVIDENCE—See CRIMINAL LAW (3).

PAROL EVIDENCE—See MORTGAGES (4).

PARTIES—See WILLS (1).

PARTITION.

In partition brought by the devisees under the will of their deceased mother, no sufficient title to support the bill was established by proofs that the will under which the heirs took title had never been presented for probate in the county in which decedent resided and in which the land was located; the will having been admitted to probate in a foreign State where the deviser resided when she died. *Rolph v. Rood*, 590.

See WILLS (1).

PARTNERSHIP.

After a copartnership had been summoned in to sustain its claim to the fund which had been garnished, and after the court had made a finding that such fund belonged to it, and not to the principal defendant, the fund could not be awarded to plaintiff on the theory that the copartnership had not properly registered under Act No. 101, Pub. Acts 1907 (2 How. Stat. [2d Ed.] § 2626 *et seq.*), where no affirmative relief was demanded in its behalf and it was not in court voluntarily or as a suitor. *Robbins v. Vandermeiden*, 674.

See GARNISHMENT.

PASSENGERS RIDING FREE—See CARRIERS (4).

PATENTS—See CORPORATIONS (8).

PAYMENT—See ACCORD AND SATISFACTION (1, 2); BILLS AND NOTES (1); MORTGAGES (3); PRINCIPAL AND AGENT (1, 2).

PEDESTRIANS—See NEGLIGENCE (1).

PENALTIES—See CORPORATIONS (10).

PERMANENCY OF INJURIES—See MASTER AND SERVANT (22).

PERSONAL INJURIES—See CARRIERS (1); EVIDENCE (8, 10); MASTER AND SERVANT (6, 12, 15, 17, 26, 34, 35, 42); NEGLIGENCE (1, 4); NEW TRIAL; RAILROADS (6, 8); TRIAL (8).

PETITION—See HIGHWAYS AND STREETS (1).

PLACE OF BUSINESS—See INTOXICATING LIQUORS (6-8).

PLEADING.

1. Since the passage of Act No. 77, Pub. Acts 1905 (5 How. Stat. [2d Ed.] § 13114), the distinction between trespass and case no longer exists, and a declaration framed in case for failing to place the horse in the hands of a competent driver and to treat it in a reasonably prudent and safe manner or to protect the same from brutal treatment, so that the animal became sick because thereof and died, stated a cause of action. *Pesola v. Forsten*, 95.
 2. Where a municipal corporation commenced an action for unlawful tapping of its water mains and unauthorized use of water from the city water supply, setting up in its declaration the ordinance relating to the use of water, so as to establish the existence of a contract relation between the parties, there was no misjoinder of the first three counts that sounded in case, and the remaining counts which were intended to be in trover for the illegal conversion of water, the ordinance prohibiting consumers of water from taking water without metering and paying for it. *City of Kalamazoo v. Standard Paper Co.*, 476.
 3. On the trial of an action for false imprisonment and assault and battery, plaintiff, who charged that defendant arrested her without a warrant and that he employed more force than was necessary, was properly refused the right to recover for excessive force in making the arrest, not having alleged that, if the arrest was lawful, the defendant used more force than was necessary. *Nay v. Dickinson*, 684.
- See AMENDMENTS (1); APPEAL AND ERROR (2); FRAUD (2); MASTER AND SERVANT (17, 19, 20); NEGLIGENCE (10); WATERS AND WATERCOURSES (1).

PLEDGE.

Upon an issue of fact as to the ownership of certificates of certain shares of stock, evidence considered, and *held*, to justify the trial court in granting complainant the relief prayed, and in finding that defendant was in possession as pledgee, the indebtedness secured having been paid. *Strong v. Chaney*, 37.

See EQUITY (1).

POLICE POWER—See NUISANCE (2).

POSSESSION OF REAL PROPERTY—See VENDOR AND PURCHASER.

PRACTICE—See APPEAL AND ERROR (4); CONTEMPT (4); TRIAL (10).

PRESCRIPTION—See MUNICIPAL CORPORATIONS (1, 4); NUISANCE (1).

PRESIDING OFFICER—See MUNICIPAL CORPORATIONS (5).

PRESUMPTIONS—See BANKS AND BANKING (3); EVIDENCE (2); MASTER AND SERVANT (31); NEGLIGENCE (10); TRIAL (2); WILLS (6).

PRINCIPAL AND AGENT.

1. The question whether an agency exists is a mixed question of law and fact. *Cunningham v. Irwin*, 629.

2. A gratuitous payment, though made upon request, by a father, of his son's debts, to which he is a stranger and for which he is not legally responsible, does not necessarily involve an agency in law: one may act in the interest of another, with or without his knowledge, without becoming technically his agent. *Id.*

3. In an action for coal which plaintiff claimed to have provided for use during the construction of a society home for indigent members or families of defendant, evidence considered and *held*, to present an issue of fact whether the board having charge of the construction work authorized the purchase of the materials. *Lake-Ulrickson Co. v. Grand Lodge, I. O. O. F.*, 653.

See ACCORD AND SATISFACTION (3); CORPORATIONS (5); EQUITY (2); FRAUD (4); MASTER AND SERVANT (5); MUNICIPAL CORPORATIONS (7); RAILROADS (5); REFORMATION OF INSTRUMENTS (3, 6).

PRIVILEGE—See TRIAL (7).

PROBATE—See ESTATES OF DECEDENTS; PARTITION; WILLS (1).

PROCESS—See FALSE IMPRISONMENT (1-3, 5).

PROHIBITION—See INTOXICATING LIQUORS (2, 4).

PROXIMATE CAUSE—See CRIMINAL LAW (5, 7).

PUBLICATION OF CONTEMPT—See CONTEMPT (3).

PUBLIC NUISANCE—See MUNICIPAL CORPORATIONS (3); NUISANCE.

PUBLIC OFFICERS—See CONSTITUTIONAL LAW (1).

PUBLIC SERVICE COMMISSION—See MANDAMUS (1).

QUO WARRANTO—See CORPORATIONS (1).

RAILROADS.

1. Where a railroad company applied to the circuit court of Wayne county to restrain the enforcement of an order of the Michigan railroad commission, and relief was denied and the decree affirmed on appeal, and an appeal to the Supreme Court of the United States was refused, after which the company filed an original bill for an injunction in the United States district court and took an appeal from the decree denying relief as against the order of the commission, the respondent must be held to have elected a forum for the trial of the controversy by filing suit in the State courts and was not in a position to make application thereafter to the Federal court on the contention that it had jurisdiction of the legal questions involved. *Michigan Railroad Commission v. Detroit & Mackinac R. Co.*, 234.
2. The determination of the question of the validity of such order was not a legislative but a judicial question. *Id.* 235.
3. Where the application of relator to the Federal court had been denied, upon the ground that the State courts properly had jurisdiction of the questions involved, at the election of the railroad corporation, mandamus would issue to enforce the order. *Id.*
4. A railroad corporation has the right to impose such restrictions upon liability to passengers riding on a branch line on its logging trains as it may see fit; general rules in use for the operation and maintenance of trains on the main line being impracticable. *Van Auken v. Michigan Central R. Co.*, 331.
5. A conductor has no authority to bind his employer by permitting or inviting the servant of another corporation to ride upon its train free of charge in contravention of the established rates and schedules. *Id.* 332.
6. Where the evidence, in an action for personal injuries to an infant under three years of age, tended to show that if either engineer or fireman had maintained a lookout along the track they must have seen plaintiff and another child on the track and discovered their size and helpless

RAILROADS—Continued.

position in ample time to have stopped the train, and where the engine was running through a populous section of a city, across numerous street intersections and along a portion of the track which the public had used extensively as a way and traversed continually, and there was evidence of an eyewitness that those in charge of the engine were not looking ahead along the track, the trial court erred in directing a verdict for the defendant, on the ground that no actionable negligence was established. *Huggett v. Erb*, 524.

7. While children *non sui juris* who invade private property are technically trespassers, they are not wilful trespassers, knowingly doing a wrong or incurring risk, in a sense which would legally charge them with negligence or personal responsibility as in the case of older persons who are not under disability. *Id.*
8. Although the infant was injured on defendant's station grounds, and defendant had posted warning signs forbidding trespassing, where the public, nevertheless, made frequent use of the right of way to pass between the street and defendant's station, and the child was too young to comprehend the warning or the danger, the employees of the defendant railroad corporation were required to exercise care and prudence to prevent an injury to the child on a clear stretch of track away from the confusion of yard work and freight cars, at a point where the public were accustomed to frequent the tracks as a way of travel. *Id.*
9. Accordingly, the questions as to the extent to which defendant's track was traveled at the place of the accident, defendant's knowledge of the use, and the degree of care required in operating trains in that locality, should have been left to the jury. *Id.* 525.

See CARRIERS; MANDAMUS (1); MASTER AND SERVANT (1, 4, 12, 13, 26, 28).

RAPE.

The essential facts necessary to convict a respondent of statutory rape are that he had sexual intercourse with the female mentioned in the information and that she was then under the age of 16 years. *People v. Ayers*, 241.

See CRIMINAL LAW (2, 10).

RATIFICATION—See REFORMATION OF INSTRUMENTS (4, 6).

REAL ESTATE BROKERS—See BROKERS (2, 3).

REAL PROPERTY—See CONTEMPT (6); DEEDS; EASEMENTS; HUSBAND AND WIFE (2); MORTGAGES; REFORMATION OF INSTRUMENTS (1).

RECEIVERS.

1. After the appointment of a receiver, in a suit instituted by the relator as majority stockholder and officer to dissolve a construction company, and after a sale of the assets of the defendant corporation named in the bill of complaint had been ordered by the court upon the intervention of a number of creditors who asked for such sale of the property, and while other proceedings were pending in the principal case, relator filed a bill of complaint charging the receiver with bad faith and neglect of duty and asking that the suit be consolidated with the other proceedings pending. No leave to commence suit was obtained from the court which had appointed the receiver. On motion of the receiver the bill was stricken from the files of the court on the ground that it could not be filed without leave of the court and that it unwarrantably interfered with the proceedings pending. *Held*, that the action of the lower court would not be set aside in mandamus, and that no duty was shown requiring the court to grant permission to institute the second suit in chancery. *Abbott v. Wayne Circuit Judge*, 61.
2. Also, the lower court was not required to permit the relator to file an answer in behalf of the defendant corporation in the supplementary proceedings in which the creditors of the construction company had petitioned for dissolution, where the corporation had appeared by its solicitors and filed an answer, and where it was not shown that the answer was corruptly prepared or that the solicitors were unauthorized or were acting in bad faith. *Id.*
3. But an order of dissolution and sale of the assets of defendant was a final order from which stockholders that showed cause why the corporation should not be dissolved could take an appeal, although the order was entered in the proceedings for intervention by its creditors, instead of being made in the proceeding for voluntary dissolution. 3 Comp. Laws, § 10890; 5 How. Stat. (2d Ed.) § 13598. *Id.*

RECEIVER'S SALE—See DAMAGES.

RECORD—See APPEAL AND ERROR (3).

REDEMPTION—See LIMITATION OF ACTIONS; TAXATION.

REFORMATION OF INSTRUMENTS.

1. Only in case of a mutual mistake will equity reform a written lease of real property. *Hartz v. Hilsendegen*, 129.
2. *Held*, that no mistake was established by the evidence, showing that complainant's written lease was executed by the widow of the deceased owner, in her name, and not as or for the heirs or in behalf of the estate of decedent, as averred in complainant's bill to reform the writing. *Id.*
3. Where, after the discharge of the administrators of an

REFORMATION OF INSTRUMENTS—Continued.

- estate, the widow of decedent assumed to administer the property, claiming a life interest in the real estate under the will, and in her own name executed a lease of certain business property for ten years, the heirs having a remainder interest could not be held to have bound themselves, and the lease terminated at her death. *Id.*
4. Evidence considered, and *held*, not to show that the heirs entered into an arrangement to pool their interests with that of the widow, or that the heirs ratified or confirmed the lease as affecting their remainder. *Id.*
 5. Such remaindermen and heirs were not estopped to treat said lease as at an end, upon the death of the life tenant who executed it, where they never did anything to induce the lessee to believe that they were parties to the agreement, or were bound by it. *Id.*
 6. In the absence of testimony that the heirs intended to confirm the execution of a lease by the widow of deceased, or that she claimed to be acting for them, the doctrine of ratification could not apply. *Id.*
 7. Equity will not enforce strictly the legal rule of merger, but will prevent or permit a merger of estates according to the actual or just intent of the parties, as it may be expressed or implied. *Id.*
 8. Whether or not the purchaser of the premises took title in good faith without notice of defendants' lease, he obtained all the title which the remaindermen were entitled to claim by force of their deed of the premises executed immediately after the widow's death, and he could enforce any rights which they had. *Id.* 130.

REGULATION—See **INTOXICATING LIQUORS** (2).

REMAINDERMEN—See **REFORMATION OF INSTRUMENTS** (3-5, 8).

REPLEVIN—See **TAXATION** (10).

RESCISSION—See **FRAUD** (3); **INFANTS**.

RES IPSA LOQUITUR—See **NEGLIGENCE** (6, 10).

RESTRAINT OF TRADE—See **CORPORATIONS** (1-10).

RETAIL LIQUOR DEALERS—See **INTOXICATING LIQUORS** (1, 2, 4-8).

RETURN OF JUSTICE—See **CERTIORARI**.

RIGHT OF WAY—See **EASEMENTS**; **INJUNCTION**; **RAILROADS** (7-9).

RULES—See **MASTER AND SERVANT** (12); **RAILROADS** (4).

SAFE PLACE—See **MASTER AND SERVANT** (17, 20, 29, 31-33, 37, 38, 41, 44).

SALES.

1. Where plaintiff wrote to defendant, in response to a request for an offer for a quantity of potatoes, that defendant might ship one car of medium size, round, white Michigan potatoes, \$1.05 "your track," "potatoes to be sacked in 150 pound sacks, providing man accompanies car if weather remains cold and heat same, as we will not run any risk of potatoes being frosted," and if satisfactory plaintiff would take two more; where plaintiff telegraphed further, "Potatoes * * * must be in 150 pound sacks. Wire us if you cannot get sacks, we will express them. Must have one car this week, balance next week;" repeating the instructions as to quality, etc., and where defendant replied, "Cannot ship until I get cars. Also, I haven't got sacks, as you know, over phone. Will try and ship this or next week if I can get cars," plaintiff writing that he had arranged to have the railroad company send cars and was forwarding sacks, there was no contract, because the minds of plaintiff and defendant did not meet as to the risk of freezing, or the sending of a man in the car. *Kraus v. Hansen*, 52.
 2. Assumpsit does not, however, lie against a defendant who participated in fraudulent misrepresentations upon the sale of a horse, but who received none of the proceeds of the sale that were paid to the codefendant and by him retained. *Patterson v. Kasper*, 281.
 3. An express warranty as to quality and method of packing preserved fruit did not exclude an implied warranty of fitness for use and consumption. *Wolverine Spice Co. v. Fallas*, 361.
 4. Delay in commencing an action for breach of the implied warranty of fitness might be excused by testimony that the defect claimed to exist was not obvious and it required time to discover the existence of such unfitness. *Id.*
- See EVIDENCE (1, 11); FRAUD (3); FRAUDS, STATUTE OF (1); INFANTS.

SAVING QUESTIONS FOR REVIEW—See APPEAL AND ERROR.

SCHOOLS AND SCHOOL DISTRICTS.

1. The school district of the city of Traverse City was authorized to issue bonds to raise money to build and repair school buildings, under the provisions of the general law, which are made applicable by the express terms of section 10, title 7 of Act No. 424, Local Acts 1895. *Board of Education of Traverse City v. Straub*, 665.
2. And the limit of bonded indebtedness fixed by Act No. 12, Pub. Acts 1911 (4 How. Stat. [2d Ed.] § 9932), amending 2 Comp. Laws, § 4717, and providing that the district may issue bonds up to 10 per cent. of the assessed valuation or \$100 per capita, based on the census of school children,

SCHOOLS AND SCHOOL DISTRICTS—Continued.

was also applicable to said city, under section 10, title 7 of the local act. *Id.*

3. And, on the same ground, the election might be held at an annual or special meeting as the general law authorizes. *Id.* 666.

4. The fact that the bonds were voted in 1913 and not issued until the next year would not be a reason for challenging their validity, the evidence tending to show that a contract had been let for the building of a schoolhouse and that the money was not needed until the later date. *Id.*

See CONSTITUTIONAL LAW (3, 4); EVIDENCE (11).

SEARCH AND SEIZURE ACT—See INTOXICATING LIQUORS (3).

SECTION LINE, LOCATION OF—See HIGHWAYS AND STREETS (2).

SETTING ASIDE JUDGMENT—See JUDGMENT (2).

SHADE TREES—See TELEGRAPHS AND TELEPHONES.

SHERIFFS—See FALSE IMPRISONMENT (2, 4, 6); INTOXICATING LIQUORS (3).

SIDEWALKS—See NEGLIGENCE (1).

SIGNS—See NEGLIGENCE (1, 2, 4).

SIMILAR CONDITIONS—See EVIDENCE (11).

SPECIAL LEGISLATION—See CONSTITUTIONAL LAW (2).

SPECIAL QUESTIONS—See TRIAL (1, 9).

STATE FIRE MARSHAL—See CONSTITUTIONAL LAW (2).

STATUTE OF FRAUDS—See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS—See LIMITATION OF ACTIONS.

STATUTES—See APPEAL AND ERROR (1); CONSTITUTIONAL LAW 3, 4); LIMITATION OF ACTIONS; MUNICIPAL CORPORATIONS (1); PARTNERSHIP; SCHOOLS AND SCHOOL DISTRICTS (1, 2); WITNESSES (2).

STATUTE, TITLE OF—See CONSTITUTIONAL LAW (3); INTOXICATING LIQUORS (2); MASTER AND SERVANT (7).

STOCK AND STOCKHOLDERS—See FRAUD (2); RECEIVERS (3).

SUBSCRIPTION FOR STOCK—See FRAUD (2).

SUBSEQUENT ASSESSMENT—See TAXATION (4).

SUBSEQUENT OFFENSE—See CRIMINAL LAW (10).

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SUIT PENDING—See MANDAMUS (2); RAILROADS (1).

SUMMARY PROCEEDINGS—See LANDLORD AND TENANT.

SUPERVISORS—See MUNICIPAL CORPORATIONS (5).

SUPREME COURT RULES—See APPEAL AND ERROR (3).

SURETY COMPANY—See INTOXICATING LIQUORS (5).

SURPLUSAGE—See INTOXICATING LIQUORS (6).

TAXATION.

1. In giving notice to the owner of lands that have been sold for unpaid taxes, the purchaser may properly include in the amount required to redeem the taxes for previous years which remain unpaid, and which the tax purchaser was required to pay in order to obtain title. *Olosser v. McBride*, 594.
2. The tax title was not void because in giving such notice he grouped in one parcel the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ and the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, or the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, as it appeared in his tax deed, although the assessments for previous years were levied and returned against the separate parcels. *Id.*
3. But the notice should disclose the exact and correct amount which may be required for redemption, or it will be invalid. *Id.*
4. Hence a notice which included in the total named as the sum required to redeem from the tax title, the tax of a year following that for which the property was sold, including penalties based on the additional tax, was invalid, since the notice demanded an excessive amount. *Id.*
5. The tax notice being void, defendant became a trespasser in entering into possession and retaining possession of the real property. *Id.*
6. A purchaser by getting a quitclaim deed from the holder of the record title from the government secured the right to redeem from the holder of tax deed who had failed to serve a valid notice. *Id.*
7. Having deposited with the register in chancery the sum required to redeem the lands, plaintiff was entitled to maintain ejectment without securing a reconveyance of the property. Act No. 229, Pub. Acts 1897, § 141 (1 How. Stat. [2d Ed.] § 1912). *Id.* 595.
8. Nor was the occupier entitled to recover for improvements under 1 Comp. Laws, § 3927 or § 10995 (1 How. Stat. [2d Ed.] § 1875, 5 How. Stat. [2d Ed.] § 13195). *Id.*
9. After a valid sale for taxes and after the period of redemption has expired, the State possesses the absolute title; the only interest which the landowner has is the privilege

TAXATION—Continued.

of securing a reconveyance upon sale to an individual by the State. *Gustin v. Fitzpatrick*, 640.

10. The owner of the record title of land which has been sold to the State for delinquent taxes, the period of redemption having expired, and which is thereafter acquired by a purchase of the tax title, has no right to maintain replevin for posts and ties, cut on the premises, although a statutory notice has not been served by or on behalf of the holder of the tax interest. *Id.*

See LANDLORD AND TENANT.

TELEGRAPHS AND TELEPHONES.

Shade trees in the highway adjacent to a farm belong to the owner of the land and may not be destroyed or injuriously trimmed by a telephone company in violation of 2 Comp. Laws, § 6691 (3 How. Stat. [2d Ed.] § 7214), Act No. 283, Pub. Acts 1909 (2 How. Stat. [2d Ed.] § 2348). *Bolender v. Southern Michigan Telephone Co.*, 646.

See FRAUDS, STATUTE OF (1).

TENANT'S DUTY AS TO WATER SUPPLY—See NEGLIGENCE (9).

TENDER—See LIMITATION OF ACTIONS.

TERM OF EMPLOYMENT—See MASTER AND SERVANT (10, 11).

THEATERS AND SHOWS—See CONSTITUTIONAL LAW (2).

TIE VOTE—See MUNICIPAL CORPORATIONS (6).

TIMBER—See TAXATION (9, 10).

TIME—See CONTEMPT (5).

TIME OF ACCRUAL—See LIMITATION OF ACTIONS.

TITLE TO REAL PROPERTY—See CORPORATIONS (11); DEEDS (1); TAXATION (9).

TORTS—See CORPORATIONS (6, 7); PLEADING (2).

TOWNSHIPS—See INTOXICATING LIQUORS (4-8); MUNICIPAL CORPORATIONS (5, 6, 10).

TRAMMERS—See MASTER AND SERVANT (40).

TRAVERSE CITY CHARTER—See CONSTITUTIONAL LAW (3, 4); SCHOOLS AND SCHOOL DISTRICTS (1).

TREES—See TELEGRAPHS AND TELEPHONES.

TRESPASS—See ASSAULT AND BATTERY; PLEADING (1); RAILROADS (6-8); TAXATION (5).

TRESPASS ON THE CASE—See PLEADING (1, 2).

TRIAL.

1. Answers to special questions that would not be controlling of the verdict need not be required. *Moss v. Detroit & Mackinac R. Co.*, 40.
2. Unless the record indicates that the jury arrived at its verdict by an improper method, it will be presumed that the method was a proper one and that no irregular compromise was effected by the jurors in reaching the result, a verdict for plaintiff. *Richardson v. Detroit & Mackinac R. Co.*, 206.
3. It was not prejudicial error for the court to advise the jurors that the question of damages is necessarily a matter of compromise, or that it was a question of estimate; that verdicts in the class of cases that was before the court were always the result of compromises; cautioning them that they should not, however, forego their honest opinions. If he meant by the word compromise mutual concessions in computing unliquidated damages in the class of cases in which the damages were unascertained, and the court will so presume on error, the charge was not objectionable when no claim was made that the verdict exceeded a reasonable amount and the point was not presented on a motion for new trial. *Id.* 207.
4. In an action brought by a married woman for fraudulent representations which induced her to purchase a hotel, counsel for plaintiff did not commit reversible misconduct in referring to the fact that her husband had children by a former marriage, during his opening of the case to the jury. *Bales v. Evans*, 383.
5. Nor did the trial court err in declining to strike out testimony of the defendant, volunteered during his cross-examination, that he had run a "blind pig" in the hotel about 18 years before the trial, as too remote and irrelevant and immaterial; the witness proving to be unruly and evasive and the court ruling that the testimony could only be considered as affecting the credibility of the witness. *Id.*
6. It is the duty of the court to interfere, either upon objection being made or without waiting for objections, to prevent counsel from browbeating, intimidating, or insulting any witness. *Id.*
7. Where a witness has declined to answer a question on the ground of privilege, the jury may well be cautioned that they should not infer misconduct or criminality from the refusal, but should regard the same as failure of proof; counsel who argues to the jurors that the effect of such failure to answer amounts to an admission of guilt, commits reversible error. *Id.*
8. Unfair comments of plaintiff's attorney, in the argument of a personal injury case, to the effect that defendant's witnesses had never seen a boiler, etc., were cured by the

TRIAL—Continued.

statement of the court that the jury would remember the evidence, and by his instructions that it would be their duty to recall and be governed by the evidence. *Eberts v. Mt. Clemens Sugar Co.*, 450.

9. There was no reversible error, on the trial of a case arising out of the explosion of defendant's boiler, in declining to submit to the jury defendant's fourth special question whether the first break in the boiler occurred at a point identified in defendant's exhibit, *i. e.*, in the combustion chamber of the boiler, where it was very doubtful if the affirmative answer to the question would have been conclusive. *Id.* 451.
 10. While it is improper practice to allow the jury to take to the jury room, when they retire, memoranda or exhibits, without the consent of opposing counsel, if the appellant was not prejudiced by such proceeding it is not reversible error, and where the plaintiff introduced in evidence extended computations showing the amount of water claimed to have been unlawfully diverted from the city pipes, extending over a period of years, and the jury was allowed to have these computations, no reversible error was committed, their verdict being much less than the totals claimed. *City of Kalamazoo v. Standard Paper Co.*, 477.
 11. Arguments called out by remarks of appellant's attorney, and objected to by him, were not prejudicial error when they were made in response thereto and were cured by the instructions. *Id.* 478.
 12. In considering the contention that a verdict should have been directed for a defendant, the testimony for the opposite party must be taken as true and regarded in its most favorable light. *Scoop v. W. H. White Co.*, 539.
- See AMENDMENTS; CONTEMPT (2, 5); CRIMINAL LAW (1, 5); EVIDENCE (9, 10); FALSE IMPRISONMENT (6); FRAUD (4); HIGHWAYS AND STREETS (2); MASTER AND SERVANT (21, 27).

TROVER—See PLEADING (2).

TRUSTS—See CORPORATIONS (1-6, 9, 10).

UNFAIR COMPETITION—See CORPORATIONS (1-10).

UNITED STATES MAIL SERVICE—See BANKS AND BANKING (3).

VENDOR AND PURCHASER.

Notice of the claim of a party in possession of land is sufficiently shown by the existence of a barn standing on the strip that was the subject of dispute. *Kushler v. Weber*, 224.

See BROKERS (1, 3).

VENUE.

Testimony that stolen property was taken from the farm of a person in Dorr township, at the trial of a larceny case before a justice, sufficiently proved the venue to be in the county in which the action was tried and in which a township of Dorr was located; and the jury might properly take judicial notice that such township was situated in that county. *People v. Grimm*, 643.

See CRIMINAL LAW (12, 13).

VICE-PRINCIPAL—See MASTER AND SERVANT (35, 36).

VOLUNTARY CONFESSIONS—See CRIMINAL LAW (1).

WARNING AND INSTRUCTING SERVANT—See MASTER AND SERVANT (42, 43).

WARRANT—See FALSE IMPRISONMENT; INTOXICATING LIQUORS (3); PLEADING (3).

WARRANTY—See EVIDENCE (1, 11, 12); SALES (3, 4).

WATERS AND WATERCOURSES.

1. Damages to trees of complainant's wood lot were properly awarded by the court, under the averments of an amended bill for an injunction which charged that setting back of water by reason of increasing the height of defendant's dam would cause water to percolate and saturate the land of complainant and would damage him as the dam had not theretofore done, where it was disclosed by the evidence that the trees were actually damaged and killed because of the increased height of the dam. *Slote v. Constantine Hydraulic Co.*, 260.
2. The fact that in another suit in chancery defendant had been required to lower its dam and that damages in the case instituted subsequently to the commencement of said chancery cause had been awarded on the basis of a permanent increase in the head of defendant's power dam, was a matter to be presented to the court in supplementary proceedings: the equities of the parties could not be adjusted on appeal of the second suit. *Id.* 261.

WATER SUPPLY—See MUNICIPAL CORPORATIONS (7); NEGLIGENCE (8, 9).

WEIGHT OF EVIDENCE—See APPEAL AND ERROR (8); NEW TRIAL.

WILLS.

1. In order to obtain a sufficient title upon which to found a bill in partition proceedings by one of the devisees who claims title through the will of a deceased ancestor, resident of a foreign jurisdiction, it is necessary that the instrument be admitted to probate in the courts of this

WILLS—Continued.

- State. 3 Comp. Laws, §§ 9281, 9282 (4 How. Stat. [2d Ed.] §§ 10994, 10995). *Rolph v. Rood*, 590.
2. Under the terms of a devise to testator's son for life and at the son's death to his children, if any, or, if he leave no issue, to his "next of kin by blood relationship," his father's sister, a sister of his mother and a half brother and half sister of the mother were entitled to equal shares of the property upon the decease of the son without issue. *Morse v. Lowe*, 607.
 3. The statute of descent, 3 Comp. Laws, §§ 9064, 9068 (4 How. Stat. [2d Ed.] §§ 10959, 10963), has no application to lands which are lawfully devised; and the method of determining the relationship is to be based on the rules of the civil law. Next of kin includes half blood as well as whole blood. *Id.*
 4. It is elementary that the primary object in interpreting a will is to ascertain, if possible, the intent which the testator had in mind, and to give effect to it. The whole will should be construed together, so as to give effect, if possible, without violating well-settled rules of law, to every part or provision of it, provided such an effect can be given consistently with the general intention of the testator as ascertained from the whole will. *In re Ives' Estate*, 699.
 5. The codicil is to be construed with the will as one instrument. *Id.*
 6. There is a presumption, also, that testator intended to dispose of his entire estate by his will and not to die intestate either as to the whole or any part thereof, and the will should be so construed unless the presumption is clearly rebutted by the provisions of the will or by evidence to the contrary. *Id.*
 7. Where the testatrix disposed of her property by certain bequests and added a residuary clause stating that she gave all the rest, residue and remainder of her estate, both real and personal, and wherever situated to her three brothers and sisters, an undivided third to each, and one of them later died, to whom the testatrix gave \$10,000 by a codicil to the will, and who was mentioned in the original draft of the instrument in a clause which stated that she was sufficiently provided for, and where family history and undisputed circumstances pointed in the same direction, the adopted daughter was not entitled to any share of the residue of the property. *Id.*
 8. When it is evident from the whole tenor of the will that testator, in making the gift of an aggregate sum to certain relations, intended to provide for them collectively as a class, the designation of each individual by name, or the use of distributive words, or words denoting equality, will

WILLS—Continued.

not be held to make the gift operate as a gift of a separate interest to each individual named, which would lapse by his death before the testator. *Id.*

See ESTATES OF DECEDENTS; PARTITION; REFORMATION OF INSTRUMENTS (3).

WINDING UP—See RECEIVERS (2).**WITNESSES.**

1. Before evidence concerning instructions which were given plaintiff by a deceased officer of defendant corporation could be excluded from the record as equally within the knowledge of deceased, it must be made to appear that the testimony and facts were not within the knowledge of any surviving officer or agent, within the express conditions of section 10212, 3 Comp. Laws (5 How. Stat. [2d Ed.] § 12856). *Stetson v. Mackinac Transportation Co.*, 355.
2. Where plaintiff called for cross-examination the agents and servants of defendant, and they gave testimony under Act No. 307, Pub. Acts 1909 (5 How. Stat. [2d Ed.] § 12865), the court committed no error in charging the jury that the plaintiff was not bound by their answers and might accept as true such part or parts of their testimony as it might elect, further cautioning the jury that they must consider all the testimony in the case and making it clear to the jury that such testimony as was favorable to defendant was not eliminated but was to be weighed or considered with the other testimony. *City of Kalamazoo v. Standard Paper Co.*, 477.

See TRIAL (5-7).

WORDS AND PHRASES—See ACCIDENT; CORPORATIONS (2); ELECTIONS; MUNICIPAL CORPORATIONS (2).

WORKMEN'S COMPENSATION LAW—See ACCIDENT; MASTER AND SERVANT (1-4, 6-11).

WRITTEN DOCUMENTS—See MORTGAGES (5).

WRONGFUL INTERFERENCE—See CORPORATIONS (6).

WYANDOTTE CHARTER—See CONSTITUTIONAL LAW (1).

